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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 46

CHARLES A. MEEKER, ET UX., PETITIONERS,

vs.

AMBASSADOR OIL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1962
CERTIORARI GRANTED MARCH 4, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 641

CHARLES A. MEEKER, ET UX., PETITIONERS,

vs.

AMBASSADOR OIL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6822

CHARLES A. MEEKER, Appellant,

vs.

AMBASSADOR OIL CO., INC., Appellee.

No. 6823

W. G. HAUN, Appellant,

vs.

CHARLES A. MEEKER; SYBIL MEEKER; DOMESTIC OIL CORPORATION, a corp.; AMERICAN DRILLING COMPANY, INC., a corp.; RICHARD H. MEEKER; LOUIS T. HEATH; NORMAN GLUSS; GLENN A. SMALLEY; MICHAEL O'ROURKE; ELFRIDA VON NARDROFF; EDWARD E. BROOK; HARRY E. COLLINS; T. M. MULHERIN; OLIVE MULHERIN; JOSEPH P. MULHERIN; WALTON DISMUKES; H. K. KUGEL; TOM KUGEL; MARY JANE KUGEL; C. T. FITZGERALD; H. O. HOLLINGSWORTH; E. M. ZACHARIAS; CLARA M. ZACHARIAS; E. ROUGHTON; PAT ROUGHTON; FRANS SCHWABLE; BEVERLY SCHWABLE; JACK R. LLOYD; JAMES B. BELL; B. D. RATCLIFF; C. W. ANDREWS; THE COATES-SOUTHWEST TITLE COMPANY, now the SOUTHWEST TITLE AND TRUST CO., a corp.; and CHAMPLIN OIL AND REFINING COMPANY, a corp., Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Transcript of Record—Filed August 23, 1961

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6822

CHARLES A. MEEKER, Appellant,

vs.

AMBASSADOR OIL CORPORATION, Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed August 24, 1961

Now come the Appellants, Charles A. Meeker and his wife, Sybil Meeker, and state that they allege and intend to rely upon the following points of error made by the District Court:

1. The Court erred in denying these parties a trial by jury.

2. The Court erred in finding that the leases and assignments under which said Appellants claimed had expired for lack of due diligence in continuing drilling operations, or for any other reason.

3. The Court erred in finding that said Appellants in any way ratified the interest claimed by the Appellee, Ambassador Oil Corporation, or were in any way prohibited from contesting said interests claimed.

4. The Court erred in finding that the primary 30 day lease under which they claim, from Lowder to Hurst, was an extension of any prior lease on the property involved.

5. The Court erred in failing to grant the relief prayed for in the last amended complaint of the Appellants and in failing to grant the motion of these parties to set aside the judgment and enter judgment in their behalf, and to amend its findings of fact and conclusions of law.

6. The Court erred in denying Appellants' motion for a new trial.

O. R. Adams, Jr., Attorney for Appellant.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

• • • • • • • •

No. 8212, Civil.

CHARLES A. MEEKER, Plaintiff,

vs.

AMBASSADOR OIL COMPANY, INC., HETTIE E. LOWDER, MERLE SMITH and W. G. HAUN, Defendants.

No. 8532

W. G. HAUN, Plaintiff,

vs.

CHARLES A. MEEKER, SYBIL MEEKER, DOMESTIC OIL CORPORATION, a corp., AMERICAN DRILLING, INC., a corp., et al., Defendants.

SECOND AMENDED COMPLAINT, No. 8212—
Filed January 4, 1956

First Cause of Action

Now come the plaintiffs herein and for their cause of action against the defendants would respectfully show to the Court:

I. That the plaintiffs are citizens and residents of the State of New Mexico; that the Ambassador Oil Corporation is a corporation organized and existing under the laws of the State of Delaware, and that its main place of business is not in New Mexico; that Hettie E. Lowder is a citizen and resident of the State of Oklahoma; that Merle Smith is a citizen and resident of the State of Oklahoma; and that W. G. Haun is a citizen and resident of the State of Kansas.

II. That the amount in controversy, exclusive of interest [fol. 3] and costs, exceeds $10,000.00, and that based upon diversity of citizenship this Court has jurisdiction of this cause of action; and that a part of this cause of action is to clear title to property situated in the Western District of Oklahoma as provided by 28 U. S. C. A. 1655.

III. That on or about April 30, 1958, in a written oil and gas lease with full warranty provisions, dated and to become effective June 3, 1958, and duly recorded in the Office of the County Clerk of Logan County, Oklahoma, in Book 385 Misc. at page 694, the defendant, Hettie E. Lowder, a widow, reserving to herself a one-eighth royalty interest, conveyed to one Herman L. Hurst a working interest consisting of seven-eighths of the oil and gas production in the East Half of the Northwest Quarter (E/2 NW/4) and the West Half of the Northeast Quarter (W/2 NE/4) of Section 23, Township 16 North, Range 4 West, Logan County, Oklahoma, and containing 160 acres more or less, and that said oil lease provided that it was to terminate on July 3, 1958, if no well were commenced on said land before said termination date.

IV. That in a written instrument dated June 3, 1958, and duly recorded on June 12, 1958, in the Office of the County Clerk of Logan County, Oklahoma, Book 385 Misc. at page 698, the said Herman L. Hurst conveyed to the plaintiffs herein an overriding royalty consisting of 1/32 of 7/8 of the production under the said lease from Hettie E. Lowder, together with certain working interests and rights of exploration under the said lease, but that the said working interest is not in controversy in this cause of action.

V. That on July 1, 1958, and before termination date of the said lease, Plaintiffs and others with working interests fully commenced the drilling of a well on the said property by moving in heavy equipment, breaking ground, digging slush pits, and building roads thereon, that drilling operations were continued with all reasonable diligence and dispatch, and that said plaintiffs and others with working interests completed a commercial producing oil and gas well under the terms of said lease.

VI. That the defendant, Hettie E. Lowder, was at all times aware and well knew of the extensive work being done and expenses being incurred by Plaintiffs, and that said lease was therefore still in effect; and in addition thereto, on July 2, 1958, she orally and expressly agreed to an ex-
[fol. 4] tension of said lease until October, 1958, so that there would be no question as to the continuance of said drilling operations, and at no time did she or anyone else give Plaintiffs any notice whatsoever that she did not intend to comply with said lease or the oral agreement until said well was more than half completed on September 12, 1958.

VII. That plaintiffs had fully commenced said drilling operations before said expiration date of the lease, and that said written lease and assignments were therefore at all times and still are effective and binding; and that in addition thereto, they had so changed their position, done such work, and incurred such expenditures that even the said oral extension would be binding; and that all defendants herein were aware of all of said facts and have fraudulently tried to deprive plaintiffs of their overriding royalty.

VIII. That by a written instrument dated October 2, 1958, and recorded in the Office of the County Clerk of Logan County, Oklahoma on October 3, 1958, in Book 390 Misc. at page 691, Herman L. Hurst assigned to Plaintiffs his remaining overriding royalty of 1/32 of 7/8 of the production under the said lease.

IX. That Ambassador Oil Corporation, by its proper agents, well knowing all of the said facts regarding lease interests of the plaintiffs and the said exploration and work being done on the said property, obtained another oil and gas lease from Hettie E. Lowder purporting to convey to said corporation a working interest consisting of 7/8 of the oil and gas production of the same said property, in complete derogation of Plaintiffs' interests in said property, which latter lease was dated July 22, 1958, and was filed in the Office of the County Clerk of Logan County, Oklahoma, on August 14, 1958; and that said corporation, all of its proper officers and agents well knowing that Plaintiffs were at the time conducting a full

scale drilling operation on the said property, and for the purpose of defrauding the plaintiffs out of all of their work, labor, and mineral interests, failed to notify plaintiffs of said latter conveyance, until the said well was more than half completed; and that due to said fraudulent acts said corporation and Hettie E. Lowder are also estopped from denying said interests of these plaintiffs, in addition to the fact that Plaintiffs also had good title on the other aforesaid grounds.

[fol. 5] X. That Ambassador Oil Corporation still ostensibly retains an overriding royalty of 3/32 of 7/8 of the oil and gas production under the said purported conveyance to it.

XI. That the defendant, W. G. Haun, claims that he received an overriding royalty in this property consisting of 1/16 of 7/8 of the production from Herman L. Hurst in an assignment dated June 3, 1958, and purportedly recorded in the Office of the County Clerk of Logan County, Oklahoma, on June 26, 1958, in Book 386 Misc. at page 480; and Plaintiffs state they have no knowledge or belief as any such assignment and on that basis deny it and demand strict proof thereof.

XII. That Plaintiffs further state that if there had been any such assignment to W. G. Haun, it would not be valid because in the aforesaid assignment to these plaintiffs and others which was recorded on June 12, 1958, Herman L. Hurst only retained an overriding royalty interest of 1/32 of 7/8 of the production, and that no assignment was made to W. G. Haun under said instrument; that there was no consideration for any conveyance from Hurst to Haun, if any there was; and that W. G. Haun was at all times aware, from the outset of the drilling operation and before the time W. G. Haun claims he received and recorded the alleged conveyance from Herman L. Hurst, that it was agreed between these plaintiffs and Herman L. Hurst that these plaintiffs would receive all of the 1/16 overriding royalty, even though Plaintiffs did not receive the last half of the 1/16 override until the said conveyance dated October 2, 1958, and that as consideration for all of such interests received by Plaintiffs they expended great

time, work, and money in drilling the said well on the property, and that before such expenditures and change of position, W. G. Haun informed the plaintiffs and others with working interests that he had no interest in said property and did not wish to participate in the drilling operations, and he did not so participate, and that for these reasons W. G. Haun would be estopped from denying the interest claimed by these plaintiffs, and for the aforesaid reasons W. G. Haun has no interests in this property in question.

XIII. That the plaintiffs herein have a 27/128 of 15/16 of 7/8 working interest under the said conveyance of Herman L. Hurst on June 3, 1958, which interest is not in dispute in this action, but that no one, other than under Plain-
[fol. 6] tiffs' 1/16 override, is entitled to any overriding royalty out of the 7/8 working interest under the said lease to Herman L. Hurst, and that if it be determined that Ambassador Oil Corporation has an overriding royalty of 1/32 of 7/8 of the production, after reducing the 3/32 override claimed by said corporation by the 1/16 override claimed by these plaintiffs, any overriding interest of said corporation should not be taken out of or applied against said working interests of these plaintiffs.

Second Cause of Action

Come now the plaintiffs herein and for their separate and Second Cause of Action against all defendants herein, except W. G. Haun, state:

I. That Plaintiffs replead all of their First Cause of Action.

II. That Ambassador Oil Corporation, by its duly authorized officers and agents, and Merle Smith, acting in no ethical or legal capacity, willfully and maliciously conspired to bring about and did bring about a renunciation, breach, and repudiation by Hettie E. Lowder of the said lease to Herman L. Hurst, under which, through said assignments from Herman L. Hurst, these plaintiffs obtained their said mineral interests, and that such acts of the said defendants were for the purpose of depriving these plain-

tiffs of their lawful contract rights and mineral interests and for a wrongful monetary benefit to themselves.

III. That Ambassador Oil Corporation, Merle Smith, and Hettie E. Lowder, knowingly conspired and did the aforesaid wrongful acts for the purpose of depriving these plaintiffs of their lawful mineral interests, and thereby maliciously and unlawfully libeled and slandered the said 1/16 overriding royalty owned by the plaintiffs.

IV. That had it not been for said wrongful acts of the defendants the said 1/16 overriding royalty interest of the plaintiffs would have a market value in excess of $10,000.00, and that due to said wrongful acts the said interest has no market value.

V. That the said wrongful acts of defendants have caused the plaintiff, Charles A. Meeker, to make more than ten [fol. 7] trips from other states to Oklahoma at a cost to him in excess of $2,000.00, and have caused him additional work of more than 120 days, such work having a reasonable value in excess of $3,600.00, in efforts to protect his said interests.

VI. That Plaintiffs are entitled to reasonable attorney fees incurred in this cause of action in excess of $5,000.00.

VII. That for the said wrongful and malicious acts the plaintiffs are entitled to exemplary and punitive damages of $10,000.00 from Merle Smith and $25,000.00 from Ambassador Oil Corporation.

Wherefore, Plaintiffs pray:

1. That it be adjudged and finally determined that Plaintiffs are the lawful owners and vested with an absolute and unencumbered title to 1/16 of 7/8 of the oil and gas production in the property described in paragraph III of the First Cause of Action, and that none of the defendants herein have any interest in said property other than the 1/8 royalty interest originally retained by Hettie F. Lowder;

2. That, however, if it be determined that Ambassador Oil Corporation still retains any interest in said property, that it shall not be in derogation of or applied against any override or working interests of these plaintiffs;

3. That Ambassador Oil Corporation be ordered to account for and pay over any amounts received by them that should go to these plaintiffs under their interests claimed.

4. That Plaintiffs recover compensatory damages, jointly and severally, from Ambassador Oil Corporation, Merle Smith, and Hettie E. Lowder, in the sum of $20,600.00;

5. That Plaintiffs recover exemplary and punitive damages of $10,000 from Merle Smith and $25,000 from Ambassador Oil Corporation;

6. That Plaintiffs recover their costs in this action; and

[fol. 8] 7. For such other and further relief to which this Court may find them justly entitled.

A trial by jury is hereby requested.

O. R. Adams, Jr., Attorney for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ANSWER OF AMBASSADOR OIL CORPORATION, NO. 8212—Filed January 13, 1960

Subject to the action of the Court respecting the within and foregoing motion, defendant, Ambassador Oil Corporation, files the following answer to the second amended complaint filed herein:

1. Defendant moves separately and severally to dismiss the first and second causes of action on the ground that same fail to state facts upon which relief may be granted.

2. Defendant admits the allegations of Paragraph I of the first cause of action.

3. In answer to Paragraph II of plaintiff's first cause of action, defendant denies that the amount in controversy, exclusive of interest and costs, exceeds $10,000.00, if the plaintiff's cause of action is limited to the establishment of an overriding royalty interest only. If plaintiff's action is limited to the establishment of an overriding royalty, defendant moves to dismiss the action on the ground that there has been a complete departure from the original com-

plaint filed in this action. If the plaintiffs are suing upon the original cause of action declared upon in the original complaint filed herein, defendant admits that the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

4. In answer to Paragraph III, on the basis of the record title, defendant admits the allegations of said paragraph. Said oil and gas lease had a primary term which expired July 3, 1958.

5. Defendant admits the allegations of Paragraph IV.

[fol. 9] 6. In answer to Paragraph V, defendant denies that drilling operations were commenced on July 1, 1958. Defendant alleges that a small amount of bulldozer work was done on or about July 1, 1958, and that no further operations of any kind were conducted on the land until the first part of September, 1958, at which time a drilling rig was moved onto the land and thereafter a well was spudded.

Defendant states that it bought an oil and gas lease from Hettie E. Lowder, a widow, dated July 22, 1958, recorded in Book 388, Page 639, covering the NW 1/4; and the W 1/2 NE 1/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 240 acres, more or less, said lease having a primary term of one year and providing for the usual 1/8th royalty, which said lease is recorded in Book 388, Page 639, of the records of the County Clerk of Logan County, Oklahoma. Said lease was bought after representatives of this defendant had made a careful inspection of the leased premises and found that no drilling operations of any kind had been conducted on said land after the bulldozer work which was done on or about July 1, 1958; that no slush pits had been dug, no roads built, despite the allegations of the petition to the contrary.

7. In answer to Paragraph VI, defendant denies each and every allegation in said paragraph, and also that the oral extension pleaded would be ineffective as violative of the statute of frauds. In the event the Court should find that an oral extension was given, this defendant denies any knowledge of such extension and denies that it would be bound thereby.

8. Defendant denies the allegations of Paragraph VII.

9. On the basis of the record title, defendant admits the allegations of Paragraph VIII.

10. In answer to Paragraph IX, defendant admits that it did buy an oil and gas lease from Hettie E. Lowder, on the 22nd day of July, 1958, as hereinabove set forth. Defendant's lease was duly filed for record August 14, 1958, in Book 388, Page 639, and was of record at the time Domestic Oil Corporation, acting as operator in behalf of the plaintiffs and other interested parties, commenced the drilling of a well in September of 1958, upon the Lowder lease. Defendant alleges that it first learned that a well was being [fol. 10] drilled on said land on the 9th day of September, 1958, and that defendant on this same day notified Domestic Oil Corporation of the fact of the Ambassador lease; that Domestic, acting for itself and its other co-owners, including the plaintiffs to this action, abandoned any claim that the oil and gas lease from Hettie E. Lowder to Herman L. Hurst, dated June 3, 1958, recorded June 12, 1958, in Book 385 Page 694, of the records of the County Clerk of Logan County, Oklahoma, covering the E 1/2 NW 1/4; and W 1/2 NE 1/4 of Section 23-16N-4W, containing 160 acres, and having a primary term of thirty (30) days from June 3, 1958, was an effective oil and gas lease, and this defendant assigned to Domestic Oil Corporation by an assignment dated September 15, 1958, recorded September 30, 1958, in Book 390, Page 592, all interest in the lease from Hettie E. Lowder to Ambassador Oil Corporation, dated July 22, 1958, recorded in Book 388, Page 639, insofar as said lease covered the E 1/2 NW 1/4; and W 1/2 NE 1/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 160 acres, subject to a reservation of an overriding royalty and a production payment which was designed to recover Ambassador's lease costs, and subject to an obligation upon the part of the Assignee to pursue a continuous drilling program until said tract assigned was fully developed for oil and gas purposes on the basis of one well to each 40-acres, and subject also to the following expressed covenant and agreement:

"(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; . . . "

11. Defendant, Ambassador Oil Corporation, alleges that Domestic Oil Corporation, by an assignment dated October 8, 1958, recorded October 10, 1958, in Book 391, Page 240, of the records of the County Clerk of Logan County, Oklahoma, assigned to the plaintiff, Charles A. Meeker and Sybil Meeker, as joint tenants "an undivided 1/2 of 7/8 working interest in and to the oil and gas lease dated July 22, 1958, from Hettie E. Lowder, lessor, to Ambassador Oil Corporation, lessee, recorded in Book 388, page 639, insofar as said lease covers the following described land in Logan County, State of Oklahoma:

East Half of the Northwest Quarter (E 1/2 NW 1/4) and West Half of the Northeast Quarter (W 1/2 NE 1/4) of [fol. 11] Section 23, Township 16 North, Range 4 West, Logan County, Oklahoma", and subject to the following expressed covenant:

"This assignment is made Subject to the Terms And Provisions of the agreement dated October 8, 1958, between Assignor and Charles A. Meeker, and is Subject to its proportionate part of an outstanding 3/32 Overriding Royalty Interest and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is Subject to all of the provisions of the lease assignment from the Ambassador Oil Corporation to Domestic Oil Corporation recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma."

12. In answer to Paragraph X, Ambassador Oil Corporation admits that it and its assignees are the owners of all rights reserved by it in the aforesaid assignment of September 15, 1958, to Domestic Oil Corporation, recorded in Book 390, Page 592.

13. In answer to Paragraph XI, defendant denies that the overriding royalty claimed by W. G. Haun covers the Ambassador lease hereinabove pleaded, or in anywise relates to the controversy between plaintiffs and this defendant.

14. In answer to Paragraph XII, defendant states that the matters pleaded relate to the claim of W. G. Haun which are not germane to the original issues raised in this action.

15. In answer to Paragraph XIII, defendant denies that plaintiffs have any claim or right which would in anywise lessen or detract from this defendant's interest in the oil and gas leasehold estate.

In answer to the "Second Cause of Action", this defendant alleges:

1. In answer to Paragraph I, defendant restates all of the denials hereinabove made.

2. In answer to Paragraph II, defendant denies each and every allegation thereof.

3. In answer to Paragraph III, defendant denies each and every allegation thereof.

[fol. 12] 4. In answer to Paragraph IV, defendant denies each and every allegation thereof.

5. Defendant denies the allegations of Paragraphs V, VI, and VII.

Wherefore, having fully answered, defendant prays that it be discharged with its costs.

Embry, Crowe, Tolbert, Boxley & Johnson. By C. Harold Thweatt, Attorneys for Defendant, Ambassador Oil Corporation.

• • • • • • •

[fol. 39]

IN UNITED STATES DISTRICT COURT

MOTION OF W. G. HAUN FOR SUMMARY JUDGMENT, Nos. 8212 and 8532—Filed September 6, 1960

Comes now the plaintiff, W. G. Haun, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, and moves the court for summary judgment in his favor, that the depositions, answers to interrogatories, pleadings, affidavits, and other instruments on file herein, show that there is no genuine issue between plaintiff W. G. Haun and the defendants in Case No. 8532-Civil, as to any material fact and that this plaintiff is entitled to judgment [fol. 40] in his favor as a matter of law.

Robinson, Shipp, Robertson and Barnes; Collins, Hughes, Martin, Pringle & Schell, By Thos. M. Barnes, Attorneys for Plaintiff, W. G. Haun.

IN UNITED STATES DISTRICT COURT

MOTION OF DOMESTIC OIL CORPORATION, ET AL. FOR SUMMARY JUDGMENT, Nos. 8212 and 8532—Filed August 29, 1960

Come now the defendants, Domestic Oil Corporation, American Drilling Company, Inc., Norman Gluss, Glenn A. Smalley, Michael O'Rourke, Elfrida von Nardroff, Edw. E. Brook and Southwest Title and Trust Co., pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, and move the court for summary judgment in their favor, and each of them, on the grounds that the depositions, answers to interrogatories, pleadings and other instruments on file herein, show that there is no genuine issue in No. 8532-Civil between the plaintiff and these defendants as to any material fact, and that these defendants are entitled to judgment in their favor as a matter of law.

Howell and Stinchecum, By C. D. Stinchecum, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND DENYING DEMANDS FOR JURY TRIAL, Nos. 8212 and 8532 —Filed October 10, 1960

This matter came on to be heard on the 7th day of September, 1960, upon all Motions for Summary Judgment heretofore filed by parties herein and upon the demands for a jury trial made by the parties, Charles A. Meeker and Sybil Meeker, and all parties hereto were represented by their counsel of record.

The Court, after examining the evidence offered, hearing arguments of counsel, and being fully advised in the premises, finds that the said motions for summary judgment should be denied, to which ruling the parties making said motions except.

[fol. 41] The Court further finds that each of the consolidated actions are equitable actions not triable to a jury as a matter of right and for that reason jury trial is denied, to which ruling the parties, Charles A. Meeker and Sybil Meeker, except.

It is therefore Ordered, Adjudged, and Decreed that all motions for summary judgment heretofore filed herein should be and they hereby are overruled and denied; and that the demands for a trial by jury made by the parties, Charles A. Meeker and Sybil Meeker, should be and they hereby are overruled and denied.

Ross Rizley, United States District Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO RECONSIDER DENIAL OF JURY TRIAL, Nos. 8212 and 8532—Filed October 14, 1960

Now come Charles A. Meeker and Sybil Meeker, parties to this action, and move the Court to reconsider the denial of their demands for a trial by jury, and pray that the Court allow this action to be tried before a jury and that it be placed upon the jury docket.

O. R. Adams, Jr., Attorney for Charles A. and Sybil Meeker.

In United States District Court

Order Denying Motions to Reconsider Denial of Jury Trial—December 7, 1960

United States District Court
Western District of Oklahoma

Oklahoma City 1 December 7, 1960

Chambers of Ross Rizley, Judge.

Miss Vera L. Howard, Clerk, U. S. District Court, Western District of Oklahoma, Oklahoma City, Oklahoma.

Dear Miss Howard: Re: Meeker v. Ambassador Oil, No. 8212-Civil & Haun v. Meeker, et al., No. 8532-Civil. It is hereby ordered that the motions to reconsider denial of [fol. 42] jury trial by Charles A. Meeker and Sybil Meeker, parties in the above actions, be overruled.

Please notify all interested counsel of the Court's action.

Very truly yours,

Ross Rizley

In United States District Court

Findings of Fact and Conclusions of Law —April 24, 1961

These actions having been heretofore consolidated, were tried by the Court without a jury. The Court makes the following findings of fact and conclusions of law:

Findings of Fact.

1. The Court adopts and makes a part of these findings paragraphs numbered 1 to 7, both inclusive, of the Stipulation filed in this cause. The Court finds that in each of the consolidated cases the requisite diversity of citizenship exists, and that in each of the cases the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

2. On June 3, 1953, Mrs. Lowder granted to Smith a five-year oil and gas lease covering the above referred to property. On December 30, 1955, Smith assigned this lease to Haun for $4,000. On December 30, 1957, Haun assigned to Hurst without cash consideration, but reserved a 1/16 of 7/8 overriding royalty interest in oil and gas "produced, saved and marketed from the above described land under the provisions of the aforesaid (Lowder) lease, or any extension or renewal thereof. * * * " Shortly prior to the expiration of the primary term of this five year lease, Hurst telephoned Haun, at a time when Meeker was on an extension telephone, and in this conversation Haun stated that he didn't want to be out any additional expense as to this leasehold and was through insofar as paying out any more money; however, he indicated that if the lease were merely extended, or renewed, of course, he would like to retain his overriding interest as provided in the previous assignment from Haun to Hurst.

[fol. 43] 3. On April 30, 1958, Hurst obtained a 30-day lease on this property, without paying additional cash consideration, and shortly after this lease was procured, Edward E. Brook, President of Domestic Oil, contracted with the Meekers to divide equally between the Meekers and Brook a 15/16ths of 7/8ths working interest in such lease with the understanding that each party was to have the right to sell any portion of his own interest if desired. The primary term of the 30-day lease ran from June 3, 1958. On May 15, 1958, Hurst conveyed to the Meekers a 1/32nd of 7/8ths overriding royalty. This deed was given, dated, and recorded prior to Hurst's assignment to Haun of a 1/16th of 7/8ths on June 3, 1958.

4. On July 1, 1958, Hurst staked out a 10-acre location on this lease; however, it was then decided that a well with 9 feet of sand would not be profitable so Hurst moved over and staked a 20-acre location. Then Hurst employed the Back Construction Company to do some bulldozer work on this lease and by July third a small reserve pit, a circulating pit, and a road had been carved out. When such work was completed it was then decided that no further drilling activity would take place until the Corporation

Commission had made a ruling as to the appropriate spacing.

5. On July 22, 1958, nothing further had been done on the Lowder farm since July 3, 1958, and on such date Ambassador bought a lease from Mrs. Lowder for $1,800. This lease was purchased after Ambassador's lease man had consulted with Ambassador's attorney, revealed all pertinent facts to him and had been advised that in such attorney's opinion the 30-day Hurst lease had terminated for failure to diligently continue operations. Also, Mrs. Lowder's counsel advised her that in his opinion she was free to give a new lease.

6. The Ambassador lease, covering the NW 1/4 and W 1/2 NE 1/4 of said Section, Township and Range, was recorded on August 14, 1958, after title examination by Ambassador's attorney. About this same time, in mid-August, Sunray Mid-Continent filed an application for a spacing order. On September 2, 1958, the Corporation Commission granted 40-acre spacing for this area and on September 7, 1958, the Lowder No. 1 Well was spudded in with Domestic as Operator. This well reached the depth of 2,057 feet on September 9, 1958. Domestic had commenced this well without having had the title examined [fol. 44] and in reliance upon Hurst's representation that he had obtained an extension of the 30-day lease from Mrs. Lowder. Although Hurst testified that Mrs. Lowder orally extended the 30-day lease until October 1, 1958, he also testified that Mrs. Lowder in this same conversation said, "I will go down and talk to my attorney and if he thinks so, I will leave it with my attorney." Moreover, Mrs. Lowder denied she had granted such oral extension. From the evidence, the Court has concluded that Mrs. Lowder did not give an unequivical oral extension to Hurst.

7. On September 9, 1958, a representative of Ambassador learned of the commencement of the Lowder No. 1 and immediately, by telephone and letter, notified Domestic that Ambassador claimed the lease on the Lowder farm. At once, Domestic shut down drilling operations and consulted its lawyer. After investigation and study, Domestic's law-

yer advised Domestic that he feared the 30-day lease had terminated and suggested that if possible Domestic obtain an assignment of the Ambassador lease. Then Hurst, acting pursuant to instructions from Domestic, negotiated a farmout or assignment from Ambassador to Domestic. Domestic considered that this Assignment was taken for the benefit of Domestic and all other parties who had owned a working interest ownership under the 30-day lease. Efforts were made to get in touch with Mr. Meeker, but he was unavailable and a written agreement was entered into between Domestic and Ambassador without consulting Mr. Meeker. On September 15, 1958, Ambassador assigned its July 22nd lease interest as to the E 1/2 NW 1/4; and W 1/2 NE 1/4 of the property in question to Domestic for no cash consideration, but reserving to itself a 3/32 of 7/8 overriding royalty interest together with an oil payment of $2500 payable out of 28/32 of 7/8 production. Moreover, such assignment contained a specific stipulation that the 30-day lease had terminated.

8. On October 8, 1958, Domestic assigned to the Meekers an undivided 1/2 interest in the Ambassador lease insofar as it covered the 160 acres; this assignment, which was accepted by the Meekers, recited that it was "subject to all of the provisions of the lease assignment from the Ambassador Oil Corporation to Domestic Oil Corporation • • • " and contained an additional provision that "By accepting this assignment assignees do not recognize the validity of the lease above described (the Ambassador lease) and expressly reserve the right to contest its validity."

9. The evidence fails to sustain the claim of plaintiffs in [fol. 45] Case No. 8212, that there was a conspiracy in connection with the defendant Lowder's execution of the oil and gas lease to Ambassador Oil. The evidence fails to show any malice, either upon the part of the defendant Lowder, or upon the part of the defendant Ambassador Oil Corporation in connection with the execution of said lease.

Conclusions of Law.

1. Under these just recited facts, the Court has concluded that the 30-day lease was an extension or renewal of the original 5-year Lowder lease. Plaintiff Meeker considered this a new and independent lease and not merely a renewal or extension of the earlier one; Hurst's testimony was not altogether clear as to what he considered such 30-day lease, but he did assign to Haun a 1/16th of 7/8ths override on June 3, 1958. And the Court is satisfied that this 30-day lease in fact and in law was an extension of the original lease.

2. However, this lease, even though effectively extended by the 30-day lease, expired because of the lessee's failure to diligently continue operations thereon. (Read Moore Oil, Inc. v. Snakard, 150 F. Supp. 250, D. C. Okla. 1957; and Gillespie v. Dougherty, 65 P. 2d. 486, 1937). The operations on the leasehold from July 1, 1958, through July 3, 1958, were sufficient to constitute a beginning or commencement of drilling while such lease was still in effect. But thereafter no reasonable effort was made to continue these operations. A voluntary waiting for the Corporation Commission to establish spacing cannot justify the complete cessation which occurred here particularly where application for such spacing was not even made until some six weeks subsequent to the last work on the lease and where such application was made by a stranger to this specific lease, in this instance, Sunray-Mid-Continent.

3. The Meekers, plaintiffs in Case No. 8212, are not entitled to the relief they request for two distinct reasons: First, the overriding interest, which they assert, arises under the 30-day lease which has expired. Moreover, by ratifying the agreement entered into between Domestic and Ambassador and by assuming benefits under such ratification including the receiving of a working interest by virtue of such agreement, the Meekers cannot both enjoy the benefit thereof and contemporaneously partially repudiate it. "A voluntary acceptance of the benefit of a [fol. 46] transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting." 15 Okla.

Stat. Sec. 75. Also, see 75 C. J. S., p. 608; 15 Okla. Stat. Sec. 74; 19 Am. Jur. Sec. 37, p. 637. Although Meeker was not a party to the original negotiations, after he was fully apprized, he became a party to such agreement and assignment and benefited therefrom. Mr. Meeker could have refused to become a party to such compromise and stood on his rights under the Lowder lease and 30-day extension thereof. As this Court views it, Mr. Meeker's judgment in accepting the assignment from Domestic still proved good inasmuch as although he sacrificed the overriding interest for which he contended he did salvage a working interest in the Ambassador lease comparable to the working interest he held in the expired Lowder lease.

4. Mr. Haun, plaintiff in Case No. 8532, likewise is not entitled to the relief he requests. He paid a cash consideration for his original interest in the Lowder lease but made it clear he wasn't interested in putting additional money out to gain a new lease on the Lowder farm. Irrespective of this, because of the fiducial relationship between Hurst and Haun, coupled with Haun's contractual right to retain his overriding interest in the Lowder lease "or an extension or renewal thereof", Haun's interest would be deemed to carry over into the 30-day lease. See Probst v. Hughes, 286 Pac. 875 (Okla. 1930); Rees v. Briscoe, 315 P. 2d 758 (Okla. 1957). Hurst recognized this continuing interest when he assigned Haun an overriding interest on June 3, 1958. Thus, had the 30-day lease (or extension) been kept in effect by diligent drilling operations, Haun's interest would have been preserved. However, such did not occur. The Lowder lease was permitted to expire and the lease now in effect, the Ambassador, reserved no interest in Haun's favor. He gained no rights under the compromise agreement and there was no such relationship between the parties as demanded preserving an interest for Haun where a new lease was in view as distinguished from an extension or renewal of the former lease. Cf. Brannan v. Sohio Petroleum Company, 161 F. Supp. 155 (D. C. Okla. 1958).

5. Judgment should be entered in behalf of the defendants in each of the consolidated cases.

[fol. 47] Dated this 24th day of April, 1961.

Ross Rizley, District Judge.

In United States District Court

Judgment—April 24, 1961

On the 6th day of February, 1961, the consolidated causes came on for trial. At the conclusion of the plaintiff's evidence in Case No. 8212, the defendant, Hettie E. Lowder, moves for dismissal of the action against her on the ground that the plaintiff had failed to prove facts which would justify the Court in granting relief against her and the Court sustained said motion.

The evidence having been concluded in each of the consolidated cases, the Court took each of the cases under advisement, and has this date filed separate Findings of Fact and Conclusions of Law in the consolidated cases.

It Is Therefore Ordered, Adjudged and Decreed:

1. That the motion of the defendant, Hettie E. Lowder for dismissal of these proceedings as against her, and for judgment in her favor, be, and the same is hereby sustained; and it is accordingly further ordered, adjudged and decreed that the plaintiffs, Charles A. Meeker and Sybil Meeker, take nothing against the defendant, Hettie E. Lowder, and that this action be, and it is hereby dismissed on the merits as to the defendant, Hettie E. Lowder.

2. That judgment be and the same is hereby entered in each of the consolidated cases for each of the defendants, and the plaintiffs in neither case shall take nothing as against the defendants, or any of them.

3. Costs are taxed against the respective plaintiffs. Those costs that were incurred prior to the order of consolidation are taxed against the plaintiff or plaintiffs in the respective actions in which said costs were incurred. Those costs that were incurred subsequent to the order of consolidation of the two cases shall be taxed in the proportion to be hereafter determined by this Court, unless the parties plaintiff agree among themselves as to the division of such costs and file written stipulation herein fixing the division of such costs. If the parties plaintiff are

unable to agree upon the division of such costs the costs will be taxed by the Court upon appropriate motion.

[fol. 48] Entered this 24th day of April, 1961.

Ross Rizley, District Judge.

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[fol. 50]

IN UNITED STATES DISTRICT COURT

OBJECTIONS OF CHARLES A. MEEKER AND WIFE TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 2, 1961

Motion to Amend
Motion for New Trial.

Now comes Charles A. Meeker and his wife and make the following objections and exceptions to the findings of fact and conclusions of law entered herein:

Objections to Findings of Fact

1. Objection is made to finding No. 4 for the reason that the testimony clearly shows that the reason for temporary termination of drilling operations was because a dispute had arisen with Sunray Oil Company, who had offsetting acreage, as to the spacing, that such termination was reasonable under the circumstances, and such facts should be included in said finding.

2. Objection is made to finding No. 5 for the reasons that it is not supported by the record.

3. Objection is made to finding No. 6 for the reason that these parties do not agree with the Court's finding as what the testimony was and its import and for the reason that same is not supported by the record.

4. Objection is made to finding No. 8 for the reason that said finding should also include the fact that the conveyance to Meekers was a quitclaim and not a warranty conveyance, and that it in no way purported to convey the 1/16 overriding royalty claimed by Meekers.

5. Objection is made to the findings as a whole because they fail to set forth the fact that Meeker obtained the

capital and procured the drilling of the well in question, until interrupted when the adverse claim became known; that he entered into these transactions with the understanding that the 30 day lease was a new lease unburdened by the prior Haun override; the fact that both Mrs. Lowder and Ambassador Oil Corporation knew of the work done on the lease before the purported conveyance to Ambassador Oil Corporation, and of the lease under which Meekers claim, and that they failed to notify anyone holding under the Hurst lease of their intentions; that notices of intention to drill had been filed with the Corporation Commis- [fol. 51] sion and published in a local newspaper before said purported lease to Ambassador Oil Corporation; and that Mrs. Lowder and Ambassador Oil Corporation knowingly sat by and allowed the Hurst and Meeker group to continue their operations on the lease without notice of adverse claim until the well had reached 2,057 feet on September 9, 1958, and that under the circumstances the acts of Ambassador Oil Corporation and Mrs. Lowder were wrongful and malicious.

Objections to Conclusions of Law

Objection is made to all conclusions of law, because they are not supported by the applicable law, by the findings of fact or by the record.

Wherefore, these parties respectfully move the Court to amend its findings of fact and conclusions of law to conform with said objections and exceptions, and to enter judgment for these parties.

Motion for New Trial.

Now come Charles A. Meeker and his wife and, in the event of an adverse ruling on the foregoing motion, respectfully move the Court to grant a new trial in this action for the reason that these parties had requested a jury trial in this matter and were entitled to a jury trial, and that said request for a jury trial was denied by the Court.

O. R. Adams, Jr., Attorney for Meekers.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT, ETC.—
May 8, 1961

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Oklahoma City 1 May 8, 1961

Chambers of Ross Rizley, Judge.

Miss Vera L. Howard, Clerk, U. S. District Court, Federal Building, Oklahoma City, Oklahoma.

Dear Miss Howard: Re: Charles A. Meeker, et al. vs. Ambassador Oil Corporation, et al., No. 8212-Civil W. G. Haun vs. Charles A. Meeker, et al. No. 8532-Civil. It is hereby ordered that the objections to Findings of Fact and [fol. 52] Conclusions of Law, Motion to Amend, and Motion for New Trial filed by Charles A. Meeker and his wife, are hereby overruled in each of these cases.

Please notify interested counsel of this ruling.

Very truly yours,

Ross Rizley

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[fol. 53]

IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings

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[fol. 58] HERMAN HURST, called as a witness on behalf of the plaintiff Meeker, being duly sworn, testified as follows:

Direct examination.

By Mr. Adams:

Q. Will you state your name.
A. Herman Hurst.
Q. Where do you live?
A. 411 Northwest 47th, Oklahoma City.

[fol. 59] Mr. Adams: I offer this in evidence as plaintiff Meeker's Exhibit No. 1.

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The Court: It will be admitted.

• • • • • • •

[fol. 60] Mr. Adams: I offer this instrument in evidence as Plaintiff's Exhibit No. 2.

• • • • • • •

[fol. 61] The Court: It will be admitted.

• • • • • • •

Mr. Adams: That had not been conveyed to other people. What we have is a quit claim to the Meekers. We offer this as Plaintiffs Meekers' Exhibit No. 3.

The Court: It will be admitted.

• • • • • • •

[fol. 62] Q. Can you tell us whether or not any work was done on that lease before that expiration date?

A. Yes. We were having a little difficulty in completing the Robinson well which off-set her land, or this particular Hattie Lowder lease, and we knew that we were going to need a little more time on it, so I went up to Guthrie to see Mrs. Lowder and I talked to her about it, and I told her our lease was getting short and they had some trouble on the Robinson lease, the Robinson well--

Q. Was there any work done on this lease before that expiration date of July 3rd?

A. Yes, sir.

Q. Will you explain what work was done.

A. Well, we staked a ten acre location and in, I would say six hours after we staked the ten acre location, I had a call from Tulsa, from the Sunray, who had the offset to the south and east—

Q. We will leave that for a little while. I want you to describe all the work that was done before the end of the day on July 3rd and who did it, the dates it was done and all those things, as best you can remember.

A. The Beck Construction Company that dug the slush pit on the Robinson was ordered to dig a slush pit on the Hattie E. Lowder on the first day of July, and they were over there that afternoon. The location was staked and they started work. Then we got the orders from Tulsa that a well with nine feet of sand wouldn't be profitable to drill on ten acres location, so we moved over and staked a twenty acre

location. Then we got orders to hold everything until the Corporation Commission could make a ruling—

Q. Before this time did you complete any of the slush pits?

A. I wouldn't say slush pits; a little reserve pit, the circulating pit had been completed. I don't think they had got so far as to say the big pit, anything had been done to it. The road had been built; the location had been staked and they had the work done.

• • • • • • •

[fol. 64] Q. Do you know whether or not Mrs. Lowder knew about this work?

A. Well, of course, she lives in town. She lives on West Noble there in Guthrie. She doesn't live on the farm. She says Arthur Beck is her tenant on the farm, and he does our dirt work there.

Q. Was she told about the work?

A. I told her about it.

Q. Do you remember what dates she was told?

A. I was there on July first, second and third, and she was going away. Her nephew was going to take her somewhere over the holidays. She was worried about the Robinson well. It wasn't showing very good at that time. He had water problems and she was afraid it wasn't going to make a well and she wasn't going to get a well. I explained to her I thought it would be all right; that it would take a little time and work to do it. She was all worked up.

Q. We have previously referred to this thirty day written lease. Were there any other agreements between you and Mrs. Lowder regarding this property?

A. Yes. Our time was running out again. I was referring to the thirty day lease, but we had moved on. I told her we had moved on and I told her what we had done; that we had built a road and built a pit, and we got this call from Tulsa. She didn't want to go down and talk to Mr. Kelly. She wanted to talk with her lawyer and when I left her she said, "If you are not on there drilling by October first, don't come by here any more, but I am going to give you the extension and if you haven't got a well going by that time don't ever come back," and we started on Sep-

tember second. That was after the Corporation Commission ruled on the spacing.

* * * * * * *

[fol. 65] Q. Will you explain the circumstances of any interruptions there may have been.

A. Yes. After staking location No. 1, a ten acre location and after staking Location No. 2, the twenty acre location, then the Sunray said: "Shut it down until they get this order from the Corporation Commission," and they applied for it. The record will show the Sunray made the application.

Q. What was the nature of this application?

A. It was an application for spacing to see whether they were going to give us a ten or twenty acre location. It was summer time. Everybody was on vacation, and they kept continuing it over until the morning of September second. On the morning of September second they ruled on the twenty acre spacing. I called Mr. Brook and told him about the ruling and he was either on the ground that afternoon or the next day.

Q. The day the Corporation Commission gave the ruling on the new spacing?

A. Yes, sir; that the spacing would be one well to forty acres.

Q. Why hadn't Mr. Brook moved on and spudded a well before that time?

Mr. Thweatt: We object to that as calling for a conclusion.

The Court: I think that is correct.

By Mr. Adams:

Q. What was the reason for any interruption of the work?

A. Waiting for the spacing order.

Q. When you terminated the work, what was the reason for that?

A. Because the Sunray had asked for a temporary shut down until we could get a spacing order approved by the Corporation Commission.

Q. Why didn't you go ahead and continue your work in the face of this application?

[fol. 66] A. Well, if we had drilled the well on a ten acre tract we would have been penalized and maybe ruined the well. You can't dig slush pits all over the farm up there.

Q. How long have you been involved in drilling in Oklahoma?

A. Well, I would say 25 years.

Q. How many transactions have you been involved in where wells were drilled?

A. Oh, I don't know; say a hundred or more.

Q. Did you feel it would be reasonable to continue such work in the face of the application made by Sunray?

A. I don't think so.

* * * * * * *

Q. Was the well spudded before the oral extension Mrs. Lowder gave you?

Mr. English: We object to that. That assumes a state of facts not in evidence.

The Court: Objection overruled. He claims there was.

By Mr. Adams:

Q. Was a well spudded before that date?

A. Well, actually not spudded, no.

Q. I mean before the time the extension would have run out on October first, was it spudded?

[fol. 67] A. Oh, certainly. The well was in by that time.

* * * * * * *

[fol. 68] Q. State whether you are familiar with the fact that Ambassador Oil Corporation got another lease from Hettie Lowder on this same property?

A. Yes, sir.

Q. When did you first hear about the Ambassador lease?

A. Well, it must have been about the middle of September; maybe not that far along. Mr. Brook called me one morning and said the Ambassador Oil Company had advised them they were drilling on their lease and not on their own lease, and I told him I thought they were nuts. I said, "I thought our lease was good." I called up my lawyer, Paul Brown, and couldn't get hold of him and I called Mr. Meeker. He is a lawyer and he was in San Francisco, and

I couldn't reach him, so I called Mr. Brooks' lawyer and got his advice on it.

Q. At the time you first heard of Ambassador's claim what had been done on the lease?

A. The well was below two thousand feet; maybe 2200 or 2600 feet before Ambassador had served notice that the Domestic Oil Company was on their lease.

• • • • • • •

By Mr. Adams:

Q. Would you say it was the policy to get release from prior lessees?

A. Yes, sir, it is.

Q. Did any one ever approach you for a release?

A. No, sir.

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[fol. 70] Cross examination.

By Mr. Thweatt:

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Q. Now Mr. Hurst, you have also testified that you staked this ten acre location under the thirty day lease and that you were intending to drill a well at that location and that you were stopped because of orders. Is that correct?

A. That is correct.

Q. What orders are you talking about?

A. The Corporation Commission; Sunray Oil Corporation.

Q. You say there was a Corporation Commission order?

A. Well, they didn't issue an order for it but had we drilled the well against the permit of the Commission we would have been penalized and couldn't produce the well.

Q. I submit that is your conclusion.

A. It has been done right here in the state.

Q. There was no order from the Corporation Commission that prevented you drilling that well?

A. No, sir.

• • • • • • •

[fol. 71] Q. At the time the ten acre location was staked on the Hettie Lowder farm was there any spacing order in force and effect by the Corporation Commission?

A. No, sir.

Q. An application was filed by Sunray and a spacing order was entered. Is that correct?

A. That is correct.

Q. Are you familiar with what spacing pattern was established by the Corporation Commission.

A. On September second, they issued a forty acre pattern.

• • • • • • •

[fol. 74] Q. But she did tell you she would consult with her attorney?

A. She said she would consult with her attorney but when I got ready to leave she said, "Well, if you are sure you are going to drill me a well," which I was positive we were; "going to drill a well," she said, "You will have until October first," and we were on the lease and drilling in September.

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[fol. 80] Redirect examination.

By Mr. Adams:

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Q. I will turn to Page 54 of this deposition and read this part of your answer to one of the questions you were asked about your contact with Mrs. Lowder. (Reading) "So I think it was on the morning of the third before she left, I assured her she would get a well and I told her we would need an extension of time and she said: 'Well, how much time will you need?' and I said, 'Well, I don't know because I don't know when the State is going to approve that order out there,' and I said,—and she said, 'Well, I will go you one better than that. I will give you till October the 1st, and October the 1st, if you are not on that lease [fol. 81] and drilling, don't come back because you are not going to get a lease.'" Do you remember that and is that true?

A. I do. That was the last conversation I had with Mrs. Lowder.

• • • • • • •

By Mr. Adams:

Q. Has Mr. Meeker ever authorized you to enter into any compromise in this matter for him?

A. No.

• • • • • • •

[fol. 87] Recross examination.

By Mr. Thweatt:

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Q. They spudded it on what date?

A. The actual spudding date, I think they call it the 6th, but they were on the lease rigging up.

Q. So they made in two days about 2,000 feet of hole?

A. That is right.

Q. At that point you learned through Domestic that Domestic had shut down this operation because of Ambassador calling and saying that Ambassador was claiming lease on the property?

A. That is true.

Q. So on September 8th you say you conducted negotiations with Ambassador and got a lease, but still thought your 30 day lease was valid?

A. I told Mr. Gill when I talked to him at the office I thought our lease was good but we went ahead and took a lease from Ambassador.

• • • • • • •

[fol. 88] Q. Mr. Hurst, there is in evidence by the pre-trial stipulation a copy of the assignment from the Ambassador Oil Corporation to the Domestic Oil Corporation, dated September 15, 1958. If that instrument bears that date that is the date of the assignment from Ambassador to Domestic is it not?

A. That is correct. In other words, they had to get authority out of their home office in Ft. Worth. It was about a week before the actual papers came through.

Q. Was there any kind of farm out letter?

A. Not that I know of— Yes, I think they did give Domestic a letter. They operated under a letter until they could get an OK out of the Ft. Worth office.

Q. You say Domestic recommenced drilling operations after you made arrangements with Mr. Gill?

A. I think they fired up the next day.

• • • • • • •

Q. Are you telling the Court this agreement was made with Ambassador to take an assignment of Ambassador's lease without you or any one else ever talking with Mr. Meeker about the situation?

A. That is true. I will say this. I had already made my deal with Ambassador and later Mr. Brook did get hold of Mr. Meeker in California but I never did talk to him.

• • • • • • •

[fol. 89] By Mr. Morin:

Q. Under the Lowder lease Mr. Meeker's group was to have a one half working interest and Mr. Brook's group was to have a one half working interest. Under the Ambassador lease do you know whether Domestic conveyed to the Meeker group a one half working interest?

A. Ambassador or Domestic?

Q. Domestic to Meeker's group a one half working interest under the Ambassador lease?

A. Yes. I remember that very well. Mr. Meeker finally got to Oklahoma and he wasn't going to accept it and there was about a weeks argument because Mr. Meeker thought the same as I did, that our lease was good.

Q. Then what happened?

A. He finally accepted some sort of an assignment. I don't know. It was a lengthy, drawn out affair. It lasted about a week before he would accept anything under the Ambassador lease.

• • • • • • •

[fol. 92] Recross examination.

By Mr. Thweatt:

Q. Will you clear up just one point for me? After the dirt work was done on the 30th, the lease expired on July 3d, 1958, unless something was done.

A. That was the terms of the lease.

Q. After that dirt work was done did I understand you correctly there was no other work done on that lease until Domestic started drilling in the first part of September?

A. That is true. We were waiting on the hearing out at the Capitol.

Q. There was no machinery put in?

A. There was a bull dozer setting there on the lease quite awhile and some of Domestic's equipment moved over there on the lease.

Q. That was the latter part of August wasn't it?

A. But there was no work in the way of actual drilling until they moved in to drill the first of September.

Q. That was because you were afraid you might get penalized by the Corporation Commission?

A. That is correct.

Q. That is all.

(Witness Excused)

Edward E. Brook, called as a witness by the plaintiffs Meeker, being duly sworn, testified as follows:

Direct examination.

By Mr. Adams:

Q. Will you state your name please.

A. Edward E. Brook, 5700 Stonewall Drive.

Q. Will you state your occupation?

A. President of the Domestic Oil Corporation and also the American Drilling Company.

* * * * * * *

[fol. 93] Q. Who did the American Drilling Company contract with to drill this Lowder well?

A. Mr. Meeker and his associates.

• • • • • • •

[fol. 99] Mr. Thweatt: We offer Ambassador's Exhibit 5 in evidence.

The Court: It will be admitted.

• • • • • • •

[fol. 102] Cross examination.

By Mr. Thweatt:

• • • • • • •

Q. Mr. Brook, after this Hettie Lowder No. 1 well was drilled, it was completed as what character of a well?

A. A producing well.

Q. A producing oil well?

A. Yes, sir.

Q. Who is the pipe line purchaser?

A. Champlin Oil.

Q. Champlin examined the type of property?

A. Yes, sir.

Q. Champlin circulated division orders did it not?

And payments are being made presently to assignees of the Ambassador lease. Is that not correct?

A. Yes, sir.

Q. That is all.

Redirect examination.

By Mr. Adams:

Q. Is it true this company is paying out all the money?

A. No.

• • • • • • •

[fol. 103] The Court: I have Exhibit 5 and it is an assignment of an oil and gas lease from Domestic Oil Corporation to Charles and Sybil Meeker.

By Mr. Adams:

Q. Do you remember an assignment to Meeker?

A. Yes, sir.

Q. Could you tell me if this is a copy of the same one?
A. It looks like it.
Q. Now Mr. Brook I wanted to read part of the assignment, which says: "By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity." Do you know who caused that clause to be inserted in this assignment?
A. Mr. Meeker.
Q. Why did he tell you he wanted that in there?

Mr. Thweatt: Mr. Meeker is here. He can testify to that if he wants to. I will withdraw the objection.
The Court: You may proceed.

By Mr. Adams:

Q. Why Mr. Brook?
A. Mr. Meeker did not feel that Ambassador's lease was valid and he wanted a chance to prove it.
Q. Did Mr. Meeker ever authorize you to enter into any compromises for him?
A. No.

• • • • • • •

[fol. 104] Q. Under this assignment from Domestic then to Mr. Meeker later on, did this include any over-riding royalty?
A. It did for Ambassador.
Q. But did it for Mr. Meeker?
A. No.
Q. Did he tell you that was the reason for him putting this clause in here?
A. One of the reasons.
Q. What were the other reasons?
A. The other reason was that Ambassador had an over-ride instead of him.
Q. Did he object to their over-ride?
A. Yes.

• • • • • • •

[fol. 105] Q. So if you had drilled that well in Mr. Meeker would have gotten his over-ride plus one half the 7-8th

working interest. How was that changed when you made this deal with Ambassador?

A. Well, the only changes that went in then instead of Mr. Meeker getting the over-ride, Ambassador took a 3-32d and eliminated Mr. Meeker's over-ride and they took the 3-32d.

Q. What about the one half working *interested?*

A. It remained the same.

[fol. 106] Q. Mr. Meeker was to get one half the working interest?

A. The only difference was that over-ride.

Q. That is what we are fighting over here now as far as Mr. Meeker is concerned. Is that correct?

A. That is right.

Q. You didn't consult Mr. Meeker?

A. No. I couldn't find him.

Q. Did you make any effort to find him?

A. Yes.

Q. What did you do?

A. I called Albuquerque and found out he was in California and I couldn't locate him right then. I did locate him in a day or two.

Q. A day or two after you made this assignment?

A. No; after Mr. Hurst went down and made the new deal for the benefit of everybody.

Q. That was after Mr. Hurst made this deal for the benefit of everybody but himself, pursuant to that you took the written assignments under the new deal, didn't you?

A. Yes, sir.

Q. Had you located Mr. Meeker before you took the assignment from Ambassador?

A. No, I don't think we got hold of him immediately. As soon as we could shut down we made the deal immediately to protect everybody in it.

Q. You knew you couldn't make a deal, didn't you, as far as Mr. Meeker was concerned because he had the same interest in this working interest you had. You knew that didn't you, and he also had an over-ride?

A. Yes.

Q. You had no authority to deal him out of either one. Who was representing him at the time?

A. No one.

Q. You and Hurst and Ambassador just made a deal?

A. Yes.

Q. In which you cut him out of his over-ride?

A. The way we looked at it, we didn't cut him out. We kept him in. Our advice was to take it in order to protect his interest; otherwise, it would have been lost.

Q. You didn't include the over-ride did you?

A. No, sir.

Q. Somebody's advice to you was that you had better make this deal or he wouldn't have one half of seven-eighths.

A. Wouldn't have anything.

Q. Your lawyer told you that?

A. Yes, sir.

Q. That was your lawyer's opinion after looking into the matter?

A. Yes, sir.

Q. Now you say you couldn't get hold of Mr. Meeker at that time. When did you get hold of him?

[fol. 107] A. It was a day or two later than that.

Q. After you got the assignment?

A. After the deal was made. The paper work took a few days.

Q. Was it after you got this letter?

A. No; it was before we got the letter.

Q. You got hold of him before you got the letter and before the assignment was made. Is that right?

A. Yes.

Q. What did he say?

A. He didn't like it. I don't remember the exact words.

Q. Where was he?

A. He was in California.

Q. Did he come home?

A. He did shortly, in a few days I believe; a week maybe.

Q. By the time he got home you had received the letter and received the original assignment had you?

A. Yes.

Q. Now what I want to find out—he said he didn't like it. Was it on that trip that you finally made a deal with him or some deal in connection with this deal that had been made with Ambassador?

A. No, we didn't make a deal. When we accepted the Ambassador deal we accepted that only with the thought of

protecting the interests all of us had in it. There wasn't a deal made. He took the assignments with his objections written in the assignment.

Q. What I am trying to find out is, on the 8th of October, 1958, when you assigned to Mr. Meeker *a* undivided one half of seven eighths working interest in and to an oil lease dated July 12, 1958 from Hettie E. Lowder to Ambassador Oil Corporation, had Mr. Meeker at that time been informed by you fully as to the deal you had made with Ambassador?

A. Yes, sir.

Q. You say he didn't like it when you told him about it, but after he said he didn't like it, was that on the first trip he made here you gave him this assignment?

A. I am pretty sure it was the first time he came back.

Q. Did Meeker take this assignment on the 8th day of October, 1958 after you had discussed with him in full and at length everything that had gone on between you and Ambassador *preceeding* this assignment?

A. He accepted it with his objections written in it.

Q. He objected to it but he said he didn't believe that Ambassador had a lease that was prior to the lease you worked under?

A. That is right.

Q. But he accepted this assignment?

A. Yes.

[fol. 108] Q. Then you went ahead and drilled a well?

A. Yes, sir.

Q. And got a well?

A. Yes.

• • • • • • •

[fol. 110] Q. You don't know when the Robinson well was commenced?

A. Not off hand. I think it is in my deposition isn't it?

Q. It was a direct off-set to this Hettie Lowder lease wasn't it?

A. Yes, sir.

• • • • • • •

Q. Can you tell from looking at Exhibit 6 when the Robinson well was commenced?

A. On May 8th, 1958.

Q. Can you tell when you first knew you had oil in that well?

A. When we first knew we had oil?

Q. Yes, sir.

A. It was on June 16th we started swabbing oil.

[fol. 111] Q. Then what did you do after that?

A. That was a sand-track treatment and Diesel oil squeeze and quite a bit of work, and finally on July 9th we completely finished the well, a flowing well.

• • • • • • •

CHARLES A. MEEKER, plaintiff, being duly sworn, testified as follows:

Direct examination.

• • • • • • •

[fol. 112] By Mr. Adams:

Q. State your name and address.

A. Charles A. Meeker, Albuquerque.

Q. What is your occupation?

A. Basically, I am a retired commander in the United States Navy. After selling my ranch at Langston, Oklahoma, I went into the oil business for three years.

• • • • • • •

By the Court:

Q. Just for my information, what over-ride did you have in that well?

A. Well, when I went into the deal, I had a 32d; assigned [fol. 113] a 32d to Mr. Hurst and was supposed to have a 16th. I knew absolutely nothing concerning Mr. Haun's claim until we had hit oil—

Q. I don't have reference to Mr. Haun. You had a half working interest and Domestic had a half working interest which took care of all the 7-8ths. You had a 16th over-ride?

A. I had a 32d and then later on another 62d, giving me the entire 16th over-ride.

• • • • • • •

Q. Mr. Meeker, in your dealings in Oklahoma, can you tell us what the practice and policy is in the oil business here,

in so far as leasing property is concerned that has been under a prior lease?

A. You really have to get a release. I am asked for them constantly on leases that were expiring. They send me these and I sign them. When somebody has a lease of record even though it has expired you always get a release because if there is any argument then you eliminate that argument.

Q. I hand you Meeker's Exhibit No. 2. Was that the transfer of your first interest in the lease?

A. In the Lowder lease, yes. We have got a different assignment as regards the Robinson lease, but this is the Lowder lease.

[fol. 114] The Court: We are not interested in the Robinson.

A. No, sir, except I caused that well to be drilled, the discovery well.

The Court: I mean there is nothing involved in the Robinson.

A. No, sir, except I brought the well in; proved the field.

• • • • • • •

Q. When is the first time you heard of this claim made by the Ambassador Oil Corporation?

A. I was in San Francisco and I got a call from Mr. Brook at the hotel approximately September the tenth. The reason I say "approximately September tenth," He said he was shut down because the Ambassador had topped leased him, and I said I didn't think they had any claim whatever and I believe we originated the statement to "thumb your nose at them and go ahead."

Q. You didn't think he had any claim?

A. I didn't think Ambassador had any claim and I still don't.

Q. When was the first time you heard about this agreement, or assignment or whatever it was between Ambassador and Domestic?

A. I came back from San Francisco because of this mixup and it took several days to get back because I came on the train, and we came into Oklahoma City, I would say, sometime approximately the middle of September, and then, of course, I started beating the bushes trying to find out ex-

actly what had taken place because I didn't know what was going on. I figured Alababa and the forty thieves had been turned loose on me, and I was trying to find out what was going on, and I wouldn't sign anything or look at anything with Domestic at all, but they went on—they had made their deal and they went on drilling this well and did like that, and I investigated for several days and I had to go back to New Mexico; spent a day here and came back here on October 1st. Then it continued for about a week. Then I entered into some sort of a deal with them at the end of that week, about October 8th, but I did not recognize the Ambassador lease. The problem was the Domestic—

Q. We will get to that later. Tell me, if you remember, when the thirty day extension of the Lowder lease was.

A. It was July 3d, 1958.

[fol. 115] Q. Do you of your own knowledge know of any work done on that lease before July 3d, 1958?

A. I made several trips out in around there because we were having problems in bringing this in. We were apprehensive about the expiration of that lease, and the work we wanted to do. Then we had the problem—

Q. (Interrupting) Do you know whether or not any work was done before July third?

A. Yes, I sure do. They made roads to the location. They had a pit dug on the ten acre location I know, and I believe there was some sort of a little pit on the twenty, and then it was stopped.

Q. Did you see this work being done?

A. I did not see the work being done. I saw the tractor.

Q. When did you go out there?

A. Well, it was approximately, well, some place maybe the third or July the fourth. It was finished when I got there.

Q. Do you know what interrupted the work?

A. Well, the confusion as to the permission from the Corporation Commission to drill the well that would have been on there. We had the rig stacked ready to go, and we would have been right over there but they stopped us. We couldn't drill it, because if we had *rilled* it and they wouldn't have given us an allowable it would have been impossible to develop the field so we just had to wait, and I had Mr. Hurst—he actually 'phoned the newspaper at my sug-

gestion, and had one or two notices put in there about our intending to drill because I wanted to give notice to everybody we were going to drill, and this work we did, it was everything we could possibly do. There was nothing more we could have done much except move a rig on and start drilling a well and then they could have stopped us; not given us an allowable.

Q. When was the work resumed on this lease?

A. The same day we got permission from the Corporation Commission. The rig was stacked right there ready to go.

* * * * * * *

[fol. 117] Cross examination.

* * * * * * *

By Mr. Thweatt:

Q. You made many trips before you arrived at an acceptance of this assignment you took from Domestic?

A. Oh, before I accepted this with that reservation I tried to investigate to really find out what was going on because I didn't know.

Q. You disagreed with Mr. Brook that the thirty day lease had expired. Mr. Brook told you it had terminated did he not?

A. I did not agree with him. I did not agree with his attorney. I went to the biggest firm in town and they said it hadn't.

Q. I asked you a specific question. You disagreed with Mr. Brook?

A. That is right.

* * * * * * *

[fol. 120] Q. Mr. Meeker, you have signed a division order have you not?

A. I have signed a division order, and I sent the company a copy of this assignment from Domestic in which I specifically said I did not recognize the lease of Ambassador and sent them a copy direct and told them I did not recognize this; it is in the process of a lawsuit and the working interest is not particularly at issue because I had the [fol. 121] same working interest under the other lease and

the contest was over the over-ride and oil payments, but I signed the working interest subject to that. I have never recognized the Ambassador lease.

Q. So you are claiming in this law suit that thirty day oil and gas lease is still a good deal and good lease?

A. It certainly is.

• • • • • • •

Q. When you took the assignment from Domestic you had full knowledge of the arrangement that had been made with Ambassador, did you not?

A. No, I didn't mean for it to be done; that so far as I was concerned this was a quit claim deed. In other words, without any foundation whatever. It was a quit claim deed. The warranty part is marked out, and it is a quit claim, and I took this specifically reserving the right to contest the validity of the Ambassador lease and I told the Ambassador about it too.

• • • • • • •

[fol. 122] Q. I asked you about the division orders. Have you signed a division order?

A. I signed a division order—

Q. You have answered my question.

A. I included a copy of this deed on that division order saying I signed it subject to the right of contest.

Q. Have you accepted payments from the pipe line company?

A. They have sent me payments; not all of them.

Q. You know the pipe line company is paying you under the terms of the Ambassador lease.

A. What they told me, it wasn't under what lease was in effect, but they were going to wait until the end of that law suit to find out what lease was in effect.

• • • • • • •

[fol. 126] Redirect examination.

By Mr. Adams:

Q. I will ask you again about this assignment from Domestic to you.

A. Yes.

[fol. 127] Q. Do you remember that?

A. Oh, yes.

Q. Looking at the working interests alone, did you receive anything under this instrument that you didn't already have?

A. I did not.

• • • • • • •

[fol. 131] PETER GILL, called as a witness on behalf of the Ambassador Oil Company, being duly sworn, testified as follows:

Direct examination.

• • • • • • •

Cross examination.

• • • • • • •

By the Court:

Q. Did you know Mr. Hurst?

A. No.

Q. Did you know Mr. Meeker?

A. No, sir.

Q. Had you ever talked to Mr. Meeker?

A. Never.

Q. Never did talk to him?

A. No, sir.

Q. Did you ever talk to Mr. Hurst?

A. The first time I talked to Mr. Hurst was when he came into our office and requested an assignment of the lease, of our lease.

Q. Did you look at the record before you took the lease from Mrs. Lowder?

A. I didn't personally. Our land man, Dan Walker, checked the record before we took the lease.

Q. Of course, the record showed at that time that there was a previous lease?

A. Yes, sir, though the lease had expired on June 3d.

Q. The primary term.

A. Yes. Then I checked on the ground.

Q. I know. You took the pictures. You say it is the policy of your company never to talk with the previous lessee?

A. No, it is not our policy never to talk to the previous lessee.

Q. Why didn't you do it in this case?

A. We would have talked to him before we started a well. However, we had no plans to drill this well right away.

[fol. 132] Q. Was this an offset?

A. Yes, it is.

Q. And the Robinson well was already in?

A. Yes, but that was only on two months. We didn't have any production history on the Robinson to justify offsetting it.

Q. That Robinson well had been completed at the time you took this lease hadn't it?

A. Yes, it had.

Q. And the same people that completed it had this recorded lease on this other tract?

A. This expired lease, yes, sir.

Q. That is all.

(Witness excused)

* * * * * * * *

[fol. 157]

IN UNITED STATES DISTRICT COURT

AMBASSADOR OIL CO. EXHIBIT 5.

5024 Assignment of Oil and Gas Lease

(Mid-Continent Association Form)

Book 391 Page 240

State Of Oklahoma Logan County: SS

This instrument Was Filed For Record On October 10, 1958 At 10:10 O'Clock A.M. And Duly Recorded In Book 391 Page 240 Fee $1.60 G. B. Hannah, County Clerk By Kay Uhrig, Deputy.

Know All Men By These Presents:

That the undersigned Domestic Oil Corporation (hereinafter called Assignor), for and in consideration of One

Dollar ($1.00) the receipt whereof is hereby acknowleged, does hereby sell, assign, transfer and set over unto Charles A. Meeker and Sybil Meeker, husband and wife, as joint tenants in common with full rights of survivorship (hereinafter called Assignee), an undivided 1/2 of 7/8 working interest in and to the oil and gas lease dated July 22, 1958, from Hettie E. Lowder, lessor, to Ambassador Oil Corporation, lessee, recorded in book 388, page 639, in so far as said lease covers the following described land in Logan County, State of Oklahoma: East Half of the Northwest Quarter (E/2 NW/4) and West Half of the Northeast Quarter (W/2 NE/4) of Section 23, Township 16 North, Range 4 West, Logan County, Oklahoma.

This assignment is made subject to the terms and provisions of the agreement dated October 8, 1958, between Assignor and Charles A. Meeker, and is subject to its proportionate part of an outstanding 3/32 overriding royalty interest and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is subject to all of the provisions of the lease assignment from the Ambassador Oil Corporation to Domestic Oil Corporation recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma. Edw. E. Brook certifies that he hes authority as President of Domestic Oil Corporation to make this assignment. Executed This 8th day of October, 1958.

Domestic Oil Corporation

By: Edw. E. Brook, President

(Seal)

Attest:

By Mary E. Davis
Assistant Secretary

[Verified.]

• • • • • • •

[fol. 163]

IN UNITED STATES DISTRICT COURT

MEEKER EXHIBIT 1.

No. 88 Producers Special
Oil And Gas Lease
F.L.B. Form With Regulation Clause

Agreement, Made and entered into the 3rd day of June, 1958 by and between Hettie E. Lowder a widow, of Guthrie Oklahoma, hereinafter called lessor (whether one or more), and Herman L. Hurst Oklahoma City, Oklahoma, hereinafter called lessee:

Witnesseth: That the said lessor, for and in consideration of One and other Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on part of lessee to be paid, kept and performed, has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee for the sole and only purpose of exploring by geophysical and other methods, mining and operating for oil and gas, and of laying of pipe lines, and of building tanks, powers, stations and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of Logan, State of Oklahoma, described as follows, to-wit:

The East Half of the Northwest Quarter (E/2 NW/4) and the West Half of the Northeast Quarter, (W/2 NE/4) of Section 23 Township 16 North Range 4 West and containing 160 acres, more or less.

It is agreed that this lease shall remain in force for a term of 30 days from June 3rd, 1958, thereafter as oil or gas or either of them is produced from said land by lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in the pipe line to which lessee may connect wells on said land, the equal one-eighth part of all oil produced and saved from the leased premises.

2nd. To pay lessor one-eighth (1/8) of the gross proceeds each year, payable quarterly, for the gas from each well [fol. 164] where gas only is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8), payable monthly at the prevailing market rate for gas; and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling on said land during the same time, by making lessor's own connections with the well at lessor's own risk and expense.

3rd. To pay lessor for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the proceeds, at the mouth of the well, payable monthly at the prevailing market rate.

If no well be commenced on said land on or before the 3rd day of July, 1958, this lease shall terminate as to both parties.

• • • • • • •

[fol. 166] In Testimony Whereof We Sign, This the 30th day of April, 1958.

Mrs. Hettie E. Lowder

Witnesses:

_____

_____

_____

[Verified.]

In United States District Court

Meeker Exhibit 2.

Assignment Of Oil And Gas Lease

3163

Book 385 Page 700
My Reference or Deed Number 17

Know All Men By These Presents:

That the undersigned Herman L. Hurst (hereinafter call Assignor) for and in consideration of One Dollar ($1.00)

the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto See list of Assignees and their respective interest as outlined below (hereinafter called Assignee) One-Half (1/2) interest in and to the oil and gas lease dated June 3, 1958 from Hettie E. Lowder lessor to Herman L. Hurst, lessee, recorded in book 385 page 694, in so far as said lease covers the following described land in Logan County, State of Oklahoma:

East Half of the Northwest Quarter (E/2 NW/4) and West Half of the Northeast Quarter (W/2 NE/4) of Section 23, Twp. 16 North, Range 4 West.

[fol. 167] Charles A. Meeker, is hereby granted exclusive right to enter into any working interest agreement for all interests shown in this assignment. This shall however be for mutual benefit of all concerned, and each shall share in direct proportion to their respective interest.

Interest are all sold subject to a total (1/16) overriding interest in the following parties:

1/32 overriding interest to Charles A. Meeker and wife Sybil F. Meeker, as joint owners with full rights of survivorship and includes a full 1/32 on entire quarter section.

1/32 overriding interest to Herman L. Hurst and wife Gustille Hurst, as joint owners with full rights of survivorship

Assignee	Interest	
Harry E. Collins	1/64	*Parties marked*
Louis T. Heath	1/64	opposite their
*T. M. Mulherin and wife Olive	1/128	names are Husband
Joseph P. Mulherin	1/128	and wife. In each
Walton Dismukes	1/128	case they shall be
H. K. Kugel	1/64	considered as
*Tom Kugel and wife Mary Jane	1/64	Joint owners with
C. T. Fitzgerald	1/64	each other with
H. O. Hollingsworth	1/128	full rights of sur-
*E. M. Zacharias and wife Clara M.	1/64	vivorship for the
*E. Roughton and wife Pat	1/64	particular interest

*Frans Schwable and wife Beverly	1/128	set opposite their
Jack R. Lloyd	1/64	names, but are not
James B. Bell	3/64	to be joint owners
B. D. Ratcliff	1/64	with any other in-
C. W. Andrews	1/64	terest holders.
*Charles A. Meeker and wife Sybil F.	33/128	

together with the rights thereto and the personal property thereon, appurtenant thereto, or used or obtained in connection therewith.

And for the same consideration the Assignor covenants with the Assignee, its or his heirs, successors or assigns: That the Assignor is the lawful owner of and has good title to the interest above assigned in and to said lease, estate, [fol. 168] rights and property, free and clear from all liens, encumbrances or adverse claims; That said lease is valid and subsisting lease on the land above described, and all rentals and royalties due thereunder have been paid and all conditions necessary to keep the same in full force have been duly performed; and that the Assignor will warrant and forever defend the same against all persons whomsoever, lawfully claiming or to claim the same.

Executed This 15th day of May, 1958.

Herman L. Hurst

[Verified.]

Filed For Record 6/12/58 At 11:55 A.M., G. B. Hannah, County Clerk.

* * * * * * *

[fol. 169]

IN UNITED STATES DISTRICT COURT

MEEKER EXHIBIT 3.

4894 . Assignment Of Oil And Gas Lease

Book 390 Page 691 Deed #20

Know All Men By These Presents:

That the undersigned, Mr. Herman L. Hurst, of 411 NW 47th Street, in Oklahoma City, Okla., hereby called assignor, for and in consideration a valuable consideration, the receipt of which is hereby acknowledged, does hereby sell assign and transfer to:

Mr. Charles A. Meeker and his wife Sybil F. Meeker as joint owners with full rights of survivorship, both now residing at 2605 Virginia Street NE., in Albuquerque, New Mexico, hereby and henceforth called Assignees, or purchasers the following described interests as further described below:

• • • • • • •

[fol. 170] (3) All my interests under the Hettie E. Lowder Lease as originally made and dated June 3, 1958, *recorder* page 694, 385, in County Recorders office (Logan County at Guthrie, Oklahoma, is hereby quitclaimed to the Purchasers (Mr. and Mrs. C. A. Meeker). This covers property described in (2) (b) above outlined. It is hereby asserted that the claimed lease *filled* by the Ambassador Oil Company, dated July 22, 1958, and *filled* August 14, 1958 is null and void in my opinion, and that neither legally or morally did they gain any rights unto the Lowder Lease by so *filling* same.

• • • • • • •

[fol. 171] Executed This second day of October, 1958, in Oklahoma City, Oklahoma.

Deed #20

Mr. Herman L. Hurst, Seller
411—47th Street NW,
Telephone Victor 3-6507,
Oklahoma City, Oklahoma.

Filed For Record 10/3/58 At 10:00 A.M. G. R. Hannah, County Clerk.

[Verified.]

* * * * * * *

[fol. 172] Clerk's Certificate to foregoing transcript (omitted in printing).

* * * * * * *

[fol. 174]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORDER DISMISSING APPEAL AS TO APPELLEE, HETTIE E. LOWDER —December 15th, 1961

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein, Circuit Judge.

Pursuant to a stipulation of counsel for the appellant and counsel for appellee, Hettie E. Lowder, it is now here ordered that the appeal be and the same is hereby dismissed as to appellee, Hettie E. Lowder, without prejudice to any other party to this proceeding.

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —July 9th, 1962

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard and were argued by counsel, O. R. Adams, Jr., Esquire, appearing for Charles A. Meeker; Laverne Morin, Esquire, appearing for W. G. Haun; C. Harold Thweatt, Esquire, appearing for Ambassador Oil Co., Inc.

Thereupon these causes were submitted to the court.

[fol. 175]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September Term, 1962

Appeals from the United States District Court for the Western District of Oklahoma.

No. 6822

CHARLES A. MEEKER and his wife, SYBIL MEEKER, Appellants,

v.

AMBASSADOR OIL CO., INC., Appellee.

No. 6823

W. G. HAUN, Appellant,

v.

CHARLES A. MEEKER, SYBIL MEEKER, DOMESTIC OIL CORPORATION, a corp., AMERICAN DRILLING COMPANY, INC., a corp., RICHARD H. MEEKER, LOUIS T. HEATH, NORMAN GLUSS, GLENN A. SMALLEY, MICHAEL O'ROURKE, ELFRIDA VON NARDROFF, EDWARD E. BROOK, HARRY E. COLLINS, T. M. MULHERIN, OLIVE MULHERIN, JOSEPH P. MULHERIN, WAL-

[fol. 176]

TON DISMUKES, H. K. KUGEL, TOM KUGEL, MARY JANE KUGEL, C. T. FITZGERALD, H. O. HOLLINGSWORTH, E. M. ZACHARIAS, CLARA M. ZACHARIAS, E. ROUGHTON, PAT ROUGHTON, FRANS SCHWABLE, BEVERLY SCHWABLE, JACK R. LLOYD, JAMES B. BELL, B. D. RATCLIFF, C. W. ANDREWS, THE COATES-SOUTHWEST TITLE COMPANY, now the SOUTHWEST TITLE AND TRUST CO., a corp., and CHAMPLIN OIL AND REFINING COMPANY, a corp., Appellees.

O. R. Adams, Jr., for Charles A. Meeker.

Laverne Morin (T. Murray, Robinson, Wallace E. Robertson, C. E. Barnes, J. M. O'Loughlin, Thornton Wright, Jr., J. Stanley Gill, George B. Collins, Oliver H. Hughes, Robert Martin, Kenneth W. Pringle, Jr., William F. Schell, Thomas M. Burns and Robert M. Collins were with him on the brief) for W. G. Haun.

C. Harold Thweatt (Crowe, Boxley, Dunlevy, Swinford and Johnson were with him on the brief) for Ambassador Oil Corporation.

OPINION—September 10, 1962

Before MURRAH, Chief Judge, and PHILLIPS and SETH, Circuit Judges.

PHILLIPS, Circuit Judge.

These are appeals from a single judgment in two cases [fol. 177] consolidated for trial in the court below and for the hearing of the appeals in this court.

In No. 6822, Charles A. Meeker and his wife, Sybil Meeker, brought an action against Ambassador Oil Corporation, Hettie E. Lowder, Merle Smith and W. G. Haun. In their second amended complaint they set up two claims. The first claim sought an adjudication that plaintiffs were the owners of an undivided overriding royalty interest of 1/16 of 7/8 in the oil and gas produced under an oil and gas lease, dated June 3, 1958, running from Lowder to Herman E. Hurst for a primary term of 30 days, covering the East 1/2 of the Northwest 1/4 and the West 1/2 of the Northeast 1/4 of Section 23, Township 16 North, Range 4 West, Logan County, Oklahoma, containing 160 acres (hereinafter called the 30-day lease); that none of the defendants in such action have any interest in the oil and gas produced or to be produced from such land, except the 1/8 royalty interest reserved by Lowder under such lease; and that Ambassador account for Meekers' share of any moneys received by it from production from such land. In their second claim they sought damages against Smith, Lowder and the Ambassador Oil Company for alleged slander of

[fol. 178] their asserted title to such overriding royalty interest.

In No. 6823, Haun brought an action against the Meekers, Domestic Oil Corporation, American Drilling Company, Inc., Edward E. Brook and others, seeking a judgment decreeing him to be entitled to an overriding royalty interest in 1/16 of 7/8 of the oil, gas and other minerals produced from the 160-acre tract and for an accounting for his share of the oil and gas produced from such land by the defendants.

Before undertaking to state the conflicting claims asserted by the parties in such actions, we shall undertake to state the basic facts, which are not in dispute.

Lowder, at all times herein material, was the owner of the above described 160-acre tract. On June 3, 1953, she executed and delivered an oil and gas lease, running to H. S. Smith, for a primary term of 5 years, covering such 160 acres, hereinafter called the 5-year lease. It was duly recorded on July 9, 1954. It remained in effect during the primary term by the payment of delay rentals. On December 30, 1955, Smith assigned it to Haun. On December 30, 1957, Haun assigned it to Hurst, reserving an overriding royalty of "1/16 of 7/8ths of all oil, gas and casing-[fol. 179] head gas produced, saved and marketed from" such 160 acres "under the provisions of" such "lease, or any extension or renewal thereof." The assignment provided that such overriding royalty should be free and clear of any cost and expense of development and operation, "excepting taxes applicable to said interest and the production therefrom."

At the time of the assignment of the 5-year lease to Hurst, he also obtained a farmout from the Continental Oil Company of an adjoining 160-acre lease, called the Robinson lease, and purchased two adjacent leases known as the Austin and Telford leases, to form a development block of 640 acres.

The Meekers and their associates drilled a well on the Robinson lease. It was commenced May 8, 1958, and completed July 9, 1958, as a producing well.

On April 30, 1958, Lowder executed and delivered to Hurst the 30-day lease, in which she reserved a 1/8 royalty.

It was duly recorded June 12, 1958. The lease provided it should remain in force for a term of 30 days from June 3, 1958, and for so long thereafter "as oil or gas or either of them is produced from said land by lessee," and if no well was commenced on the land before July 3, 1958, the [fol. 180] lease would terminate.

By an assignment dated May 15, 1958, and duly recorded June 12, 1958, Hurst transferred to the Meekers an overriding royalty interest of 1/32 of 7/8 and 33/128 of the working interest in the 30-day lease. By the same instrument Hurst transferred to 16 other named assignees, apparently nominees of the Meekers, 31/128 of the working interest in the 30-day lease. By an assignment dated October 2, 1958, and duly recorded October 3, 1958, Hurst transferred to the Meekers an overriding royalty interest of 1/32 of 7/8 in the 30-day lease. By an assignment dated June 3, 1958, and duly recorded June 26, 1958, Hurst conveyed to Haun a 1/16 of 7/8 overriding royalty interest in the 30-day lease.

Edward E. Brook was the President of the Domestic Oil Corporation and American Drilling Company, Inc. He was the sole stockholder in American and owned about 75 per cent of the stock in Domestic. It was stipulated at the pretrial conference that after Hurst acquired the 30-day lease, the Meekers and Brook agreed that each would own 1/2 of 15/16 of the 7/8 working interest in such lease and that thereafter Hurst conveyed to Edward E. Brook and [fol. 181] the American Drilling Co., Inc., 1/2 of 15/16 of the 7/8 working interest and conveyed to the Meekers 1/2 of 15/16 of the 7/8 working interest. After the two last-mentioned transfers from Hurst were made, the Meekers, Brook and the American Drilling Company transferred to other parties fractional parts in their working interest in the 30-day lease. It was further stipulated at the pretrial conference held on September 7, 1960, that the Meekers then owned 27/128 x 15/16 of the 7/8 working interest in the 30-day lease and 27/128 x 29/32 of the 7/8 working interest in an oil and gas lease dated July 22, 1958, duly recorded August 14, 1958, running from Lowder to Ambassador, covering the 160-acre tract, and hereinafter called

the Ambassador lease; that American then owned 3/16 x 15/16 of the 7/8 working interest in the 30-day lease and 93/512 x 29/32 of the 7/8 working interest in the Ambassador lease, and that Brook then owned 3/16 x 15/16 of the 7/8 working interest in the 30-day lease and 97/512 x 29/32 of the 7/8 working interest in the Ambassador lease. The remainder of the working interest was then owned by other persons by virtue of assignments from the Meekers, or American, or Brook.

On March 28, 1958, a contract was entered into between [fol. 182] Hurst, Brook, as President of American, and the Meekers for the development of the land covered by the 30-day lease. A title opinion was furnished by Hurst to Meeker and Brook, which disclosed the overriding royalty interest of Haun. It was the intention of the Meekers to develop the property under the 30-day lease thereafter to be acquired by Hurst.

On July 1, 1958, Hurst staked out a 10-acre location on the 30-day lease. On the same day, the Beck Construction Company was ordered to do certain work preliminary to drilling on the lease. Beck started work on the afternoon of July 1 and continued on July 2. It built a road, a circulating pit, and leveled the ground for the drilling rig at the 10-acre location. After the work was started on the 10-acre location, Hurst was advised that because the sand was only nine feet thick, a well on the 10-acre location would not be profitable. He then staked out a 20-acre location on the 30-day lease and Beck broke ground on the second location. All of this occurred on July 1 and July 2. On July 2, 1958, Hurst forwarded to the Oklahoma Corporation Commission a written notification of intention to drill on the 10-acre location and another notice of intention [fol. 183] to drill on the 20-acre location. While the preliminary work was being carried on and on July 2, Sunray Mid-Continent Oil Company, which owned an oil and gas lease directly off-setting the 30-day lease to the south and east, called Hurst and objected to Hurst proceeding with the drilling of a well at either of such locations and requested him not to drill until a spacing order had been obtained from the Oklahoma Corporation Commission covering the area in which Sunray's lease and the 30-day lease were located.

It is fairly inferable from the testimony of Hurst that when Sunray objected on July 2, 1958, to the drilling of a well on the 10-acre and 20-acre locations that it advised Hurst it was going to make an application for the establishment of 40-acre drilling and spacing units. Hurst testified that he and his associates "wanted to go along with Sunray, because they were neighbors and would help develop this field."

On July 16, 1958, Sunray filed an application with the Oklahoma Corporation Commission for an order establishing 40-acre drilling and spacing units in the Southwest 1/4 of Section 13, the South 1/2 of Section 14, all of Section 23, the West 1/2 of Section 24, the Northwest 1/4 of Sec- [fol. 184] tion 25, and the North 1/2 of Section 26, all in Township 16 North, Range 4 West, Logan County, Oklahoma. The application expressly stated that exceptions should be granted to "all wells drilled or drilling." Meeker and his associates and Sunray owned all of the oil and gas leases on such land. On September 2, 1958, the Oklahoma Corporation Commission entered its order establishing 40-acre drilling and spacing units for the above-described land, except for Robinson No. 1 Well, located on the Northeast 1/4 of the Northeast 1/4 of the Southwest 1/4 of such Section 23 and ordered that such well should be the permitted well for the unit on which it was located.

As a further reason for not proceeding with drilling a well on the 30-day lease, Hurst testified that had the Meekers and their associates proceeded with the drilling of the well on the 20-acre location while the Sunray spacing application was pending before the Corporation Commission and had the Corporation Commission thereafter entered a 40-acre spacing order, the Commission would have penalized the well on the 20-acre location by reducing its allowable. Meeker testified that they would have been penalized on their allowable, had they proceeded with the [fol. 185] well while Sunray's application was pending.

Late in August, 1958, Lowder Well No. 1 was staked at a new location on the Southwest 1/4 of the Northeast 1/4 of Section 23, Township 16 North, Range 4 West. It was spudded in on September 7, 1958, and on September 9, 1958, it had reached a depth of 2,057 feet. Hurst had

represented to Domestic that he had obtained from Lowder an extension of the 30-day lease, until October 1, 1958. Such extension had not been given. On September 9, 1958, a representative of Ambassador notified Brook and Domestic that Ambassador had a lease on the 160-acre tract. Domestic then shut down operations and advised Hurst of Ambassador's claim. Brook and Hurst consulted Mr. C. D. Stinchecum, who was Domestic's attorney, and he advised them he was fearful the 30-day lease had expired for failure to continue the drilling of the well on either the 10-acre or 20-acre location with due diligence. Stinchecum also advised Brook to endeavor to work out an arrangement with Ambassador that would protect the interest of Brook and his associates.

On September 10, 1958, Hurst entered into negotiations with Ambassador. On that date an oral agreement was reached between Hurst and Ambassador, by which Ambas- [fol. 186] sador agreed to transfer the Ambassador lease to Domestic, insofar as it covered the 160-acre tract, reserving to Ambassador a 3/32 of 7/8 overriding royalty interest, together with an oil payment of $2,500, payable out of 29/32 of 7/8 of the production. The agreement was consummated by an assignment from Ambassador to Domestic, executed September 15, 1958, and duly recorded September 30, 1958, in Book 390 at Page 592 of the Records of Logan County, Oklahoma.

Brook testified that Hurst made the agreement with Ambassador "for the benefit of everybody." We think it quite obvious that by the word "everybody" he meant the working interest owners. The owners of the working interest were tenants in common.[1] Brook owed a duty to his coowners of the working interest to protect their interests.[2] Each of the working interest owners received an assignment of approximately the same proportion of the working interest under the Ambassador lease as he owned

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[1] Earp v. Mid-Continent Petroleum Corporation, —— Okl. ——, 27 P.2d 855; Moody v. Wagner, —— Okl. ——, 23 P.2d 633, 635; Harper v. Ford, —— Okl. ——, 317 P.2d 210, 214.

[2] 86 CJS Tenancy in Common §59, p. 422, et seq.; Wallace v. Brooks, 194 Okl. 137, 147 P.2d 784, 790.

[fol. 187] in the working interest under the 30-day least. No assignments of overriding royalty interests were made by Domestic or by owners of the working interest to the Meekers or to Haun.

The assignment from Ambassador to Domestic contained the following stipulation:

> "As an additional consideration for the assignment of the lease hereby assigned, Assignee hereby covenants and agrees:
>
> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; * * *."

Immediately after the oral agreement was made, Domestic resumed drilling Lowder Well No. 1 and completed it as a producing oil well on October 4, 1958.

On October 8, 1958, Domestic assigned to Charles and Sybil Meeker, as joint tenants, an undivided 1/2 of the 7/8 working interest in the Ambassador lease, insofar as it covered the 160-acre tract above described. The assignment contained this provision:

> [fol. 188] "This assignment is made subject to the terms and provisions of the agreement dated October 8, 1958, between Assignor and Charles A. Meeker, and is subject to its proportionate part of an outstanding 3/32 overriding royalty interest and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is subject to all of the provisions of the lease assignment from the Ambassador Oil Corporation to Domestic Oil Corporation recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma."

When Ambassador notified Domestic that it held a lease from Lowder on the land on which Domestic was drilling Lowder Well No. 1, Brook and Hurst undertook to con-

tact Mr. Meeker at Albuquerque by telephone, ascertained he had gone to California, and were unable to locate him. A day or two after September 10, 1961, the date when the [fol. 189] compromise agreement was reached with Ambassador, the Meekers were notified of the terms of such agreement. While Meeker expressed dissatisfaction with such compromise agreement, which was entered into for the benefit of all the working interest owners, he did not notify Brook, Domestic, or Ambassador that he repudiated the agreement, but stood by until the well was completed as a producing well. Thereafter, he accepted the assignment of October 8, 1958, from Domestic, in which he undertook to reserve his right to challenge the validity of Ambassador's lease, with full knowledge of the terms and provisions of the assignment from Ambassador to Domestic and the reservations therein contained. After the well came in, Meeker signed division orders on the basis of the Ambassador lease and the assignments thereof to Ambassador and the Meekers and the other owners of the working interest and received pipeline payments under such division orders.

The trial court held that the 30-day lease was an extension of the 5-year lease; that the operations on the 30-day lease on July 1, and 2, 1958, constituted the commencement of drilling of a well on such lease, but that such lease expired prior to the commencement of Lowder Well No. 1, [fol. 190] by reason of the lessees' failure to continue drilling operations with reasonable diligence. It also held that the Meekers were estopped to deny Ambassador's rights to the overriding royalty and the oil payment reserved to it in its assignment to Domestic.

It held that Haun's rights to his overriding royalty terminated when the 30-day lease expired and that Haun was not entitled by reason of any fiduciary relationship between him and Hurst, Brook, the Meekers and the other owners of the working interest to receive an overriding royalty of 1/16 of 7/8 of the oil and gas produced under the Ambassador lease. Judgment was entered accordingly and the Meekers and Haun have appealed.

I

The Claims of the Meekers—No. 6822

The first claim of the Meekers in Number 6822 is in substance an action to quiet title. The only interests in dispute are the Meekers' claim to an overriding royalty interest of 1/16 of 7/8 of the oil and gas produced under the 30-day lease and Ambassador's claim to an overriding royalty interest of 3/32 of 7/8 of the oil and gas produced and to an overriding royalty interest of 29/32 of 7/8 of [fol. 191] the oil and gas produced until it has received $2,500 therefrom. The working interest is not in dispute. The Meekers' share of the working interest was substantially the same under the 30-day lease and under the assigned Ambassador lease. The Meekers requested a jury trial of their first and second claims in their second amended complaint. Their request was denied.

In Oklahoma the lessee's interest under an oil and gas lease is neither a corporeal nor a possessory interest in the land. While it is a presently vested interest in the land of another, it is an incorporeal interest, or a profit a prendre.[3]

An oil and gas lease gives to the lessee an exclusive right—subject to legislative control to prevent waste, to secure the greatest ultimate recovery of oil and gas, and to protect correlative rights—to erect structures on the surface of the land covered by the lease, to explore for [fol. 192] oil and gas by drilling wells through the underlying strata, to reduce to possession the oil and gas found and obtained through such wells, and thus acquire absolute title to such oil and gas as personal property.[4]

An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense

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[3] Summers Oil & Gas, Perm. Ed., Vol. 1A, §164, p. 433; Rich v. Doneghey, 71 Okl. 204, 177 P. 86, 89; Commissioner of Internal Revenue v. McKinney, 10 Cir., 87 F.2d 811, 813; Francis v. Superior Oil Co., 10 Cir., 192 F.2d 732, 734; United States v. Stanolind Crude Oil Producing Co., 10 Cir., 113 F.2d 194, 198.

[4] Rich v. Doneghey, 71 Okl. 204, 177 P. 86, 89; Ohio Oil Co. v. Sharp, 10 Cir., 135 F.2d 303, 307; United States v. Stanolind Crude Oil Purchasing Co., 10 Cir., 113 F.2d 194, 198.

for exploration, drilling, development, operating, marketing and other costs incident to the production and sale of oil and gas produced from the lease.[5] It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest.[6]

It is generally held that an overriding royalty is an in-[fol. 193] terest in real property.[7]

While ordinarily the overriding royalty reserved in the assignment of the lessee's working interest carves out a share of the lessee's interest in the oil and gas produced free from expense, in the absence of clear language manifesting an intent so to do, it does not create the relation of tenancy in common between the lessee and overriding royalty owner, nor give the latter the right to enter upon and develop the lease and produce oil and gas therefrom.[8]

It follows that the owner of an overriding royalty interest does not have a corporeal or possessory interest in land, which could be the subject of an action in ejectment.[9]

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[5] Summers Oil & Gas, Perm. Ed., Vol. 3, §554, pp. 624, 626; Thornburgh v. Cole, —— Okl. ——, 207 P.2d 1096, 1098.

[6] Phillips Petroleum Co. v. Oldland, 10 Cir., 187 F.2d 780, 781; Wright v. Brush, 10 Cir., 115 F.2d 265, 267; Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F.2d 971, 973; Thornburgh v. Cole, —— Okl. ——, 207 P.2d 1096, 1098.

[7] Summers Oil & Gas, Perm. Ed., Vol. 3, §554, pp. 628-630; Davis v. Lewis, 187 Okl. 91, 100 P.2d 994, 996; Danciger Oil & Refining Co. v. Burroughs, 10 Cir., 75 F.2d 855, 857; National Bank of Tulsa v. Warren, 177 Kan. 281, 279 P.2d 262, 265.

[8] La Laguna Ranch Co. v. Dodge, —— Cal. ——, 114 P.2d 351, 354, 355; Chase v. Trimble, D.C.A. Cal., 158 P.2d 247, 249; Belgam Oil Co. v. Wirt Franklin Petroleum Corporation, —— Tex. App. ——, 209 S.W.2d 376, 379.

[9] See Priddy v. Thompson, 8 Cir., 204 F. 955, 960, and Oklahoma cases cited in Note 8, infra.

In Oklahoma an oil and gas lease passes no estate to the lessee that can be the subject of ejectment or other like action, Kolachny v. Galbreath, 26 Okl. 772, 110 P. 902; Brennan v. Hunter, 68 Okl. 112, 172 P. 49, 50, and the Oklahoma courts hold that a court of equity has jurisdiction to settle the validity and priority of oil and gas leases between contesting lessees, where such leases have been executed by a common landowner. Gypsy Oil Co. v. Marsh, 121 Okl. 135, 248 P. 329, 331.

[fol. 194] It is well settled that an action to quiet title is within the jurisdiction of a court of equity and as a general rule there is no right to a jury trial.[10] However, one out of possession may not maintain an action in the Federal courts in an action to quiet title against one in possession if an action in ejectment would afford a plain, adequate and complete remedy at law.[11] But Ambassador is not in possession and it has no possessory right under the overriding royalty reserved in its assignment and neither an action in ejectment nor other legal action against Ambassador would afford a plain, adequate and complete remedy at law to the Meekers.[12]

[fol. 195] Accordingly, we conclude that the Meekers' first claim in their second amended complaint was a suit in equity and that they were not entitled to a jury trial on such claim.

The Meekers assert that the trial court erred in holding that the owners of the working interest under the 30-day lease failed to continue with due diligence the drilling of the well commenced during the primary term of such lease.

Due diligence is measured by what a reasonably prudent operator would do under the existing facts and circumstances, having regard for the interest of both the lessor and the lessee.[13]

The term of the Lowder 5-year lease expired on June 3, 1958. Prior to that date, none of the owners of the working interest had done anything toward the development for oil and gas of the land covered by the lease. Realizing

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[10] 50 CJS Juries §33, p. 748.

[11] Harlan v. Sparks, 10 Cir., 125 F.2d 502, 505-506; Humble Oil & Refining Co. v. Sun Oil Company, 5 Cir., 191 F.2d 705, 718; Lancaster v. Kathleen Oil Co., 241 U.S. 551, 555.

[12] Humble Oil & Refining Co. v. Sun Oil Company, 5 Cir., 191 F.2d 705, 713.

[13] Trust Co. of Chicago v. Samedan Oil Corp., 10 Cir., 192 F.2d 282, 284; Denker v. Mid-Continent Petroleum Corporation, 10 Cir., 56 F.2d 725, 727; Broswood Oil & Gas Co. v. Mary Oil & Gas Co., —— Okl. ——, 23 P.2d 387, 389; Ramsey Petroleum Corporation v. Davis, —— Okl. ——, 85 P.2d 427, 429; Newell v. Phillips Petroleum Co., 10 Cir., 144 F.2d 338, 339.

[fol. 196] that the 5-year lease was about to expire, Hurst, in April, 1958, requested Lowder to give him the 30-day lease. Lowder complied with the request and executed the 30-day lease, the primary term of which terminated on July 3, 1958. From the shortness of the primary term and other surrounding facts and circumstances, it is reasonable to infer that Lowder and Hurst contemplated that the owners of the working interest under such lease would promptly and without further delay develop the land for oil and gas, acting with diligence and dispatch.

Within the primary term of the 30-day lease, the owners of the working interest did nothing more than stake out two drilling sites, construct roads and dig certain pits. Thereafter, they did nothing further until the latter part of August, 1958. They seek to excuse the delay by the fact that Sunray objected to the drilling of the well on the 30-day lease at either the 10-acre or 20-acre location and because of Sunray's pending application for a spacing order.

In its application Sunray expressly stated that exceptions should be granted to all wells drilled or drilling within the area described in the application. The order [fol. 197] of the Commission excepted the Robinson well and provided that it should be the permitted well for the unit on which it was located. Had the owners of the working interest continued the drilling of the well on the 20-acre location, commenced by them during the primary term of the lease, while the spacing application was pending, it is a reasonable assumption that such well would have been excepted from the spacing order. Moreover, as an alternative course, when Sunray objected to either the 10-acre or 20-acre location, they could have, within the primary term of the 30-day lease, proceeded with work on a 40-acre location that would have constituted the commencement of the drilling of a well; and when, thereafter, on July 16, 1958, Sunray applied to the Oklahoma Corporation Commission for the order establishing a 40-acre drilling and spacing unit, they could have proceeded safely with the drilling of the well on the 40-acre location. Because the producing sand was only about eight feet thick, it would not have been feasible or economical to drill wells in the

area on a spacing unit of less than 40 acres and one well would drain the recoverable oil from the formation underlying 40 acres. The Corporation Commission so found in its spacing order. We are of the opinion there was [fol. 198] no reasonable excuse, under the facts and circumstances, for the Meekers and their associates failing to proceed with the drilling of a well, either on a 20-acre or 40-acre location on the 30-day lease, while Sunray's application was pending. The trial court applied the correct test and we cannot say that his finding that, under the existing facts and circumstances, the owners of the working interest in the 30-day lease failed to proceed with due diligence with the drilling of the well, which they commenced within the primary term, was erroneous. Accordingly, we conclude that the trial court correctly held that the 30-day lease expired by reason of the failure of Meeker and the other owners of the working interest to continue the drilling of an oil and gas well with reasonable diligence after the expiration of the primary term of the lease.

The Meekers would have been entitled to a jury trial upon proper and timely request therefor of any issues remaining for determination on their second claim. However, the trial court, in the exercise of its equity jurisdiction, had determined that the 30-day lease had terminated and that the Meekers had no title to any interest [fol. 199] under such lease. Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' second claim.

The Meekers, with full knowledge of the facts, stood by and permitted American to continue the drilling of Lowder Well No. 1 under the provisions of the assignment from Ambassador to Domestic. Their working interest under the 30-day lease was in jeopardy, due to the fact that such lease may have terminated by the failure to diligently continue drilling of the well commenced during the primary term of such lease, an event which the trial court later held had happened. Their working interest was safeguarded and the risk of continuing the drilling of Lowder Well No. 1 under a doubtful title was eliminated

by the assignment from Ambassador to Domestic, taken for the benefit of the Meekers and other owners of the working interest. Moreover, the Meekers signed division orders on the basis of their interest under the Ambassador lease and received payments in accordance with their working interest under such lease. From the foregoing, it will be seen that the Meekers accepted benefits under the Ambassador lease, with full knowledge of the facts, [fol. 200] and we agree with the trial court that they thereby ratified the assignment from Ambassador to Domestic and are bound by the provisions thereof. A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.[14]

II

The Haun Claim—No. 6823

The Haun claim is predicated on the contention that a fiduciary relationship existed between Haun, on the one hand, and Hurst, Brook, and Meekers and other owners of the working interest under the 30-day lease, on the other hand; and that by reason thereof the latter were obligated to protect the rights of Haun in any extension or renewal of the 30-day lease and that Haun was entitled to an overriding royalty of 1/16 of the working interest acquired by assignments of the Ambassador lease.

Ordinarily, an overriding royalty reserved in an assign- [fol. 201] ment of a lease does not survive the termination of the assigned lease.[15] The mere assignment of an oil and gas lease does not create a fiduciary relationship between

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[14] 31 CJS Estoppel §109 a., p. 347; 15 Okl. St. Anno. §75; Federal Mining & Engineering Co. v. Pollak, —— Nev. ——, 85 P.2d 1008, 1012; Wood Naval Stores Exp. Ass'n. v. Latimer, —— Miss. ——, 71 So.2d 425, 430; See also, Elsey v. Wagner, 199 Okl. 449, 183 P.2d 829, 830.

[15] Summers Oil & Gas, Perm. Ed., Vol. 3, §554, pp. 634-637; Wier v. Glassell, 216 La. 828, 44 So.2d 882, 887, 888; Keese v. Continental Pipeline Company, 5 Cir., 235 F.2d 386, 388; Phillips Petroleum Company v. McCormick, 10 Cir., 211 F.2d 361, 364; La Laguna Ranch Co. v. Dodge, —— Cal. ——, 114 P.2d 351, 355.

the assignor and the assignee.[16] However, such a relationship may arise by virtue of additional provisions in such assignment or in a contemporaneous agreement.[17]

We hold there was no fiduciary relationship between Haun and the owners of the working interest when the Ambassador lease was assigned to Domestic or at any time thereafter.

We are of the opinion that the cases principally relied upon by counsel for Haun are clearly distinguishable on the facts from the instant case, as we shall now undertake to show.

In Probst v. Hughes, —— Okl. ——, 286 P. 875, the [fol. 202] facts were these: An overriding royalty was reserved in an assignment of an oil and gas lease. The assignment provided: "This reservation shall likewise apply as to all modifications, renewals of such lease or extensions that the assignee, his successors or assigns may secure." Thereafter, the assignee developed the lease for gas and gas was produced from the leased premises subsequent to the primary term of the lease, but such production ceased on June 1, 1924. However, on April 23, 1924, and while the lease was still in force and effect, the assignees made an annual payment under the lease for gas produced therefrom. The court held that such payment, notwithstanding the cessation of production, continued the lease in effect until after November 10, 1924. On the latter date, the assignees secured another lease of the land covered by the original lease from the grantees of the original lessor. The court held that a fiduciary relationship existed between the assignors and assignees; that the new lease was, in effect, an extension of the original lease, and that the new lease was charged with the overriding royalty reserved to the assignors in the original lease. In the instant case, a third party, who was a stranger to owners of the working interest in the 30-day [fol. 203] lease, obtained the second lease and the assignment to Domestic took place after the 30-day lease had terminated.

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[16] Summers Oil & Gas, Perm. Ed., Vol. 3, §554, p. 635.

[17] Summers Oil & Gas, Perm. Ed., Vol. 3, §554, pp. 637-641.

In Rees v. Briscoe, —— Okl. ——, 315 P.2d 758, the court held that under the facts a fiduciary relationship existed between the assignor of oil and gas leases, who reserved an overriding royalty, and the assignee thereof, and that such assignor was entitled to an overriding royalty under a second lease secured by the assignee. In that case Rees, the original lessee in oil and gas leases, assigned the leases as to two tracts covered thereby, reserving an overriding royalty. On the same date the assignment was made, the assignee executed an agreement whereby it agreed it would commence drilling operations on one of the two tracts, on or before a specified date and drill to the Bartlesville sand. The assignee did commence such well and it was completed as a producer. Rees's leases covered 70/80 of the minerals in a third tract. While the assignee was engaged in drilling such well, Rees transferred the leases as to such third tract to such assignee. The last assignment reserved an overriding royalty, but did not contain a specific provision obligating the assignee to develop [fol. 204] the third tract. However, the assignee orally promised the assignor to develop and drill wells on such third tract before the expiration of the leases. The assignee failed so to do, but while such leases were in force and unexpired, obtained a renewal lease on such third tract. It did not provide for an overriding royalty for the assignor. At the time the assignee was attempting to obtain the renewal of the leases, the owners of the minerals offered a renewal lease to the assignor, who declined it in favor of the assignee. After it obtained the renewal lease, the assignee drilled and obtained production on the third tract.

The facts in Rees v. Briscoe are materially different from the facts in the instant case, in that here there was no express agreement, oral or written, obligating Hurst or his successors to drill and develop either the 5-year lease or the 30-day lease; no such agreement may be implied from the assignment of an oil and gas lease, which reserves an overriding royalty;[18] Haun did not have an opportunity

[18] Kile v. Amerada Petroleum Corporation, 118 Okl. 176, 247 P. 681, 683; Phoenix Oil Co. v. Mid-Continent Petroleum Corporation, 60 P.2d 1054, 1061.

[fol. 205] to obtain a renewal lease from Lowder and hence did not waive such an opportunity in favor of Hurst and his successors in reliance upon the justified belief that they would protect his overriding royalty interest in any renewal lease; and the assignment to Domestic was made after the 30-day lease had expired.

In Oldland v. Gray, 10 Cir., 179 F.2d 408, the facts were these: In 1926, a group referred to in the opinion as the Oldland Group assigned their original prospecting permit on 1,760 acres of public lands, issued under the 1920 Leasing Act, 30 USCA §181, et seq., to one McLaughlin. The assignment provided that in the event leases were issued to the assignee under the permit and production was obtained, McLaughlin would pay to the Oldland Group a stipulated percentage of the market value of the oil and gas produced and saved from the leases. In the assignment McLaughlin expressly agreed "to carry on such drilling and operations on the said permit area as to fulfill the terms and conditions of the said permit within the period herein prescribed or any extensions thereof" and in such assignment it was further agreed that McLaughlin should have the right to terminate the agreement and discontinue [fol. 206] operations, provided that on abandonment he would quitclaim all his right, title and interest in the permit to the Oldland Group and, if on the date of the reassignment he had not complied with the drilling requirements of the permit, he would pay them $2,000. In 1938 McLaughlin applied for a lease in exchange for the prospecting permit, as contemplated by the 1935 amendment to the 1920 Leasing Act, 49 Stat. 674. Such amendment authorized the holder of a valid prospecting permit to "exchange the same for a lease to the area described in the permit without proof of discovery, at a royalty of not less than 12½ per centum." In 1939 the exchange lease was issued to him. In his application therefor, McLaughlin acknowledged by affidavit the interests of the Oldland Group in the permit and stated that such right would be transferred to any lease granted. In approving the issuance of the lease, the Commissioner of the Land Office expressly recited that it was granted in lieu of the existing permit. Thereafter, the lease was transferred by McLaughlin to Gray and one

Levison, with knowledge of and subject to the conditions in the permit. In 1943 and before the expiration of the 5-year exchange lease, Levison and Gray applied for and received a new lease, covering the same area, based upon [fol. 207] the preference rights granted to them by the amendment to the Leasing Act of July 29, 1942, 56 Stat. 726, which new lease was thereafter assigned to the Phillips Petroleum Company. McLaughlin did not drill the wells, as required by the permit, but kept the permit alive in the name of his assignors. Phillips took the assignment of the new lease with knowledge of McLaughlin's obligation under the original assignment of the underlying permit. The court held that a fiduciary relationship existed between the Oldland Group and McLaughlin and his successors in interest and that the Oldland Group were entitled to a royalty on the production from the new lease, as provided in the assignment of the permit.

Thus it will be seen that in Oldland v. Gray there was an express agreement by the assignee to drill and develop, and, as between the parties, the exchange lease took the place of the permit and was subject to the right reserved by the Oldland Group in the permit, and the new lease was obtained during the time the exchange lease was in effect and was a renewal or extension thereof,—factual elements not present in the instant case.

The owners of the working interest proceeded with the [fol. 208] drilling of Lowder Well No. 1 in the belief that the 30-day lease was still in force and effect. Their failure to more diligently continue the drilling of the well commenced during the primary term of the 30-day lease was not due to bad faith on their part. They acted in good faith in securing the assignment of the Ambassador lease.

Since the 30-day lease had terminated before the assignment of the Ambassador lease to Domestic for the benefit of the owners of the working interest, and such lease was obtained by a stranger to the owners of the working interest in the 30-day lease, neither the Ambassador lease nor the assignment thereof could constitute an extension or renewal of a lease that had theretofore terminated and no longer existed. That conclusion is supported by the decision of the Supreme Court of Kansas

in K & E Drilling, Inc. v. Warren, 185 Kan. 29, 340 P.2d 919, under facts not materially different from the facts in the instant case.

Accordingly, we hold, as did the trial court, that there was no extension or renewal of the 30-day lease and that Haun's rights terminated on the expiration and termination of that lease.

[fol. 209] The judgment entered in the consolidated cases is affirmed.

[fol. 210]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—September 10th, 1962

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby affirmed.

[fol. 211] Clerk's Certificate to foregoing transcript (omitted in printing.)

[fol. 212]

SUPREME COURT OF THE UNITED STATES

No. 641—October Term, 1962

CHARLES A. MEEKER, ET UX., Petitioners,

vs.

AMBASSADOR OIL CORPORATION

ORDER ALLOWING CERTIORARI—March 4, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1963

No. 46

CHARLES A. MEEKER and His Wife, SYBIL MEEKER,
Petitioners,

vs.

AMBASSADOR OIL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I.

IN THE

SUPREME COURT OF THE UNITED STATES

.....Term, 196..

No.

CHARLES A. MEEKER and His Wife, SYBIL MEEKER,
Petitioners,

vs.

AMBASSADOR OIL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on September 10, 1962

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1962. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I. Where the plaintiffs set forth two causes of action in a complaint, the first one being an action to quiet title to certain oil interests claimed, and for an accounting, and the second for money damages based upon slander of title and interference with contract rights, with a timely demand for a jury trial endorsed thereon, may the plaintiffs be deprived of a jury trial on the basis that the action is equitable or that a determination of the issues of the quiet title action will dispose of the issues in the second cause of action.

II. Whether the petitioners were estopped or validly prohibited from contesting the claim of the respondent to the oil interests involved where the petitioners claimed ownership under a chain of title to which the respondent was a stranger, but had also accepted a quitclaim conveyance from a party who obtained its interests from respondent, and in the latter conveyance the petitioners expressly reserved their right to contest the validity of the respondent's claim, and, after having obtained both conveyances, the petitioners enjoyed certain benefits from the property purportedly conveyed by both instruments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, all of which are set forth in Appendix A, are:

Constitution of the United States, Seventh Amendment.

28 U.S.C. 1254 (1).

28 U.S.C. 2201.

Rule 57, Rules of Civil Procedure for the United States.

District Courts:

Okla. Stat., Tit. 15, Sec. 74 (1951).
Okla. Stat., Tit. 15, Sec. 75 (1951).
Okla. Stat., Tit. 16, Sec. 11 (1951).

STATEMENT OF THE CASE

The factual details outlined in the opinion of the Court of Appeals are correct except for the following:

1. Meeker did not stand by without objecting and permit drilling on the well in question to continue. He clearly stated his objections to the respondent's claims at all times (Tr. 103, 106, 107, 108, 114, 117, 120, 121, 126, 127, 128).

2. Division orders were not signed, or claims made, or benefits accepted under the Ambassador Oil Corporation lease. Meeker at all times made it clear that he had paramount title under his first lease (Tr. 120, 121, 126, 127, 128).

3. The Court of Appeals stated that Hurst had not been given an extension of the 30-day lease by Mrs. Lowder (Appendix B, p. A10). Hurst testified that Mrs. Lowder had given him an oral extension (Tr. 64, 74).

It is further pointed out that all of the factual conclusions set forth by the Court of Appeals are matters which should have been determined by a jury and not the court.

Petitioners brought suit against the respondent, and others, in the United States District Court for the Western District of Oklahoma. The jurisdiction of the District Court was founded upon diversity of citizenship of the parties and on an amount in controversy exceeding the sum of $10,000.00.

The complaint upon which this action is based contained two causes of action. The first was to establish title of the petitioners to the oil and gas leasehold interests claimed and asked for an accounting of amounts received by the respondent, and the second was a tort action for money damages based upon interference with contract rights, and libel and slander of title to the leasehold interests involved. A demand for a trial by jury was made by endorsement on the complaint (Tr. 2-8). (The filing date of the complaint, shown in the transcript of record on page 8 as 1956, is obviously in error and should be 1960.)

The trial court denied the demand for a jury trial on the ground that the action was equitable, and overruled the petitioners' motion to reconsider the denial of a jury trial (Tr. 40-41).

Regarding facts material to the second question presented for review, the petitioners and their associates had commenced the drilling of an oil and gas test well on the leasehold involved, and had the well drilled about one-third down when the claim of the respondent was made known to them (Tr. 94-95). When this adverse claim was made known, a Mr. Hurst negotiated a purported settlement of the dispute, at the direction of Domestic Oil Corporation, who was then engaged in the actual drilling for the Meeker

group, but without knowledge or authorization of Meeker, and the well was continued under the new arrangement (Tr. 81-84, 121). As explained above, Meeker, as soon as this proposed settlement was made known to him, and at all times thereafter, strenuously objected to it. He did accept a quitclaim conveyance from Domestic Oil Corporation for a part of his interest claimed, but expressly reserved in the instrument his right to contest the validity of the interests claimed by Ambassador Oil Corporation (Tr. 121, 157).

The trial court found that the petitioners ratified the purported settlement agreement by receiving benefits under it (Tr. 45-46).

The petitioners appealed to the United States Court of Appeals on the questions herein presented, as well as on other points found against them by the trial court. The Court of Appeals affirmed the judgment of the trial court for respondents.

REASONS FOR GRANTING WRIT

1. The Court of Appeals held that the petitioners were not entitled to a jury trial in the portion of their action relating to the quieting of title to real property. In light of the Declaratory Judgments Act and recent statements of this Court, this question should be, but has not been, decided by the Supreme Court of the United States.

2. The Court of Appeals held that the trial court could, in its equity jurisdiction, dispose of the factual issues in the petitioners' first cause of action (the quiet title action), which would dispose of and make *res judicata* the second cause of action (a legal action for money damages based on slander of title). This holding is directly against prior decisions of the Supreme Court and other Appellate Courts on this important constitutional question.

3. The error of the Court of Appeals in holding that the petitioners were in any way estopped or prohibited from contesting the claim of the respondent should be reviewed with the more important questions set forth above.

ARGUMENT

I. The Petitioners Were Entitled to a Trial by Jury.

A trial by jury was requested by the petitioners by endorsement on their complaint (Tr. 8). The trial court denied the request upon the grounds that the actions were equitable (Tr. 41), and also denied the motion made by the petitioners to reconsider its action and allow a trial by jury (Tr. 41-42).

Under the older procedure, title to land could be determined in either a legal action by jury, if requested, or in an equitable action by the court, depending generally upon whether or not the plaintiff was in possession. *Whitehead* v. *Shattuck*, 138 U.S. 146 (1891); *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551 (1916).

This Court has now stated in *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959):

> ". . . Since in the federal courts equity has always acted only when legal remedies are inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because a substantial legal remedy becomes available, must be re-evaluated in light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as

> Bills of Peace, Quia Timet and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules."

An action to quiet title to land by one in possession is a bill *quia timet*. *McConihay* v. *Wright*, 121 U.S. 201 (1887); 4 *Pomeroy's Equity Jurisprudence* (5th Ed.) 1021, 1027, *Sections* 1394 and 1398.

No particular form of pleading is required under the Declaratory Judgments Act. 28 *U.S.C.* 2201; *Rule* 57, *Rules of Civil Procedure for the United States District Courts* (Appendix A).

As shown by the prayer of the petitioners' complaint (Tr. 7), no injunctive or other equitable relief was sought in this action. Under the Declaratory Judgments Act, the trial court should have allowed the jury to make a determination of legal title to the oil interests involved.

The technicality of whether or not the plaintiff is in possession should no longer be determinative of whether legal title to land may be decided by a jury in an ejectment action or must be determined by a court of equity in an action to quiet title.

However, regardless of whether or not the petitioners were entitled to a jury trial on their first cause of action, their second cause of action was purely an action for money damages (Tr. 6-7). The Court of Appeals recognized this on pp. 18-19 of its opinion (Appendix B), but stated:

> "The Meekers would have been entitled to a jury trial upon proper and timely request therefor of any issues remaining for determination on their second claim. However, the trial court, in the exercise of its equity jurisdiction, had determined that the 30-day

lease had terminated and that the Meekers had no title to any interest under such lease. Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' second claim."

This decision of the Court of Appeals for the Tenth Circuit was directly contrary to decisions of the Eighth and Ninth Circuits, and of this Honorable Court, which have all held that in actions where legal and equitable issues are joined, the right to a trial by jury is closely guarded, and the court may not try the equitable part of the action first, thereby causing the facts in the legal action to become *res judicata*, unless some special and impelling reasons for doing so exist in a particular case. *Leimer* v. *Woods*, 196 F.2d 828 (8th Cir. 1952); *Bruckman* v. *Hollzer*, 152 F.2d 730 (9th Cir. 1946); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). This would be true even though the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved, the jury rights it creates control. *Thermo-Stitch* v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961); *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469 (1962).

II. The Court Erred in Finding That the Petitioners in Any Manner Ratified the Interest Claimed by the Respondent, or Were in Any Way Prohibited from Contesting That Interest.

On pages A12 and A19 of its opinion (Appendix B), the Court of Appeals stated that the petitioners accepted benefits under the lease interest claimed by the respondent and stood by and allowed certain work to be done under the latter claim, which amounted to a ratification of the claim, and that the petitioners were therefore prohibited or estopped from contesting it. The petitioners' disagreement

with these factual statements were set forth above in the Statement of the Case.

Oklahoma Statutes that may be construed as involved on this point are *Okla. Stat., Tit.* 15, *Secs.* 74 and 75 (1951), and *Okla Stat., Tit.* 16, *Sec.* 11 (1951). (See Appendix A.) The Appellate Court apparently relied on Section 75, Title 15 (see page A19 of opinion, Appendix B).

Regarding the statute noted above on estoppel by deed or conveyance (Sec. 11, Tit. 16), the Oklahoma cases on the subject show that it is no more than a restatement of the common law on the subject, as are the other two statutes.

The very essence of an estoppel is that a person claiming its benefits must have been induced to do the things he did do, or to have altered his situation relying on the conduct of the party against whom the doctrine is invoked. *Tidal Oil Co.* v. *Flanagan*, 87 Okla. 231, 209 Pac. 729 (1922); *Coats* v. *Riley*, 154 Okla. 291, 7 P.2d 644 (1931).

A person already claiming title under a conveyance does not admit title in another by purchasing adverse claims, and is not estopped by the purchase from denying the validity of the claims purchased. 19 *Am. Jur.* 622, *Estoppel, Sec.* 23; 31 *C.J.S.* 199, *Estoppel, Sec.* 15.

A deed having no validity cannot be the basis of an estoppel. 31 *C.J.S.* 223, *Estoppel, Sec.* 43; *Coats* v. *Riley, supra.*

A quitclaim conveyance, such as is involved in this action, may not be the basis of an estoppel. 31 *C.J.S.* 202, *Estoppel, Sec.* 18; also see *Weaver* v. *Drake*, 79 Okla. 277, 193 Pac. 45 (1920).

As has been previously explained, the petitioners at all times denied the validity of the respondent's claim and

expressly reserved their right to contest it, and therefore all elements of ratification or estoppel are lacking. They already owned their interests involved before receiving the quitclaim assignment under the respondent's claimed chain of title, and therefore any benefits received were under their first conveyance. The latter was a nullity and conveyed nothing.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitution of the United States—Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. 1254 (1):

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

28 U.S.C. 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Rule 57, Rules of Civil Procedure for the United States District Courts:

The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., Section 2201, shall be in accordance with these rules, and the right to trial by jury

may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Oklahoma Statutes, Title 15, Section 74 (1951):

Subsequent consent ratifies.—A contract which is voidable, solely for want of due consent may be ratified by a subsequent consent. R. L. 1910, Sec. 919.

Oklahoma Statutes, Title 15, Section 75 (1951):

Acceptance of benefit includes obligations.—A voluntary acceptance of benefit of the transaction is equivalent to a consent to all of the obligations arising from it so far as the facts are known to the person accepting. R. L. 1910, Sec. 920.

Oklahoma Statutes, Title 16, Section 11 (1951):

Estoppel by receiving benefits.—Any person or corporation, having knowingly received and accepted the benefits or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves. R. L. 1910, Sec. 1150.

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT

September Term, 1962

Charles A. Meeker and his wife, Sybil Meeker, Appellants, v. Ambassador Oil Co., Inc., Appellee.	No. 6822
W. G. Haun, Appellant, v. Charles A. Meeker, Sybil Meeker, Domestic Oil Corporation, a corp., American Drilling Company, Inc., a corp., Richard H. Meeker, Louis T. Heath, Norman Gluss, Glenn A. Smalley, Michael O'Rourke, Elfrida Von Nardroff, Edward E. Brook, Harry E. Collins, T. M. Mulherin, Olive Mulherin, Joseph P. Mulherin, Walton Dismukes, H. K. Kugel, Tom Kugel, Mary Jane Kugel, C. T. Fitzgerald, H. O. Hollingsworth, E. M. Zacharias, Clara M. Zacharias, E. Roughton, Pat Roughton, Frans Schwable, Beverly Schwable, Jack R. Lloyd, James B. Bell, B. D. Ratcliff, C. W. Andrews, The Coates-Southwest Title Company, now the Southwest Title and Trust Co., a corp., and Champlin Oil and Refining Company, a Corp., Appellees.	No. 6823

Appeals from the United States District Court
for the Western District of Oklahoma
(September 10, 1962)

O. R. Adams, Jr., for Charles A. Meeker.

Laverne Morin (T. Murray Robinson, Wallace E. Robertson, C. E. Barnes, J. M. O'Loughlin, Thornton Wright, Jr., J. Stanley Gill, George B. Collins, Oliver H. Hughes, Robert Martin, Kenneth W. Pringle, Jr., William F. Schell, Thomas M. Burns and Robert M. Collins were with him on the brief) for W. G. Haun.

C. Harold Thweatt (Crowe, Boxley, Dunlevy, Swinford and Johnson were with him on the brief) for Ambassador Oil Corporation.

Before MURRAH, Chief Judge, and PHILLIPS and SETH, Circuit Judges.

PHILLIPS, Circuit Judge.

These are appeals from a single judgment in two cases consolidated for trial in the court below and for the hearing of the appeals in this court.

In No. 6822, Charles A. Meeker and his wife, Sybil Meeker, brought an action against Ambassador Oil Corporation, Hettie E. Lowder, Merle Smith and W. G. Haun. In their second amended complaint they set up two claims. The first claim sought an adjudication that plaintiffs were the owners of an undivided overriding royalty interest of 1/16 of 7/8 in the oil and gas produced under an oil and gas lease, dated June 3, 1958, running from Lowder to Herman L. Hurst for a primary term of 30 days, covering the East 1/2 of the Northwest 1/4 and the West 1/2 of the Northeast 1/4 of Section 23, Township 16 North, Range 4 West, Logan County, Oklahoma, containing 160 acres (hereinafter called the 30-day lease); that none of the defendants

in such action have any interest in the oil and gas produced or to be produced from such land, except the 1/8 royalty interest reserved by Lowder under such lease; and that Ambassador account for Meekers' share of any moneys received by it from production from such land. In their second claim they sought damages against Smith, Lowder and the Ambassador Oil Company for alleged slander of their asserted title to such overriding royalty interest.

In No. 6823, Haun brought an action against the Meekers, Domestic Oil Corporation, American Drilling Company, Inc., Edward E. Brook and others, seeking a judgment decreeing him to be entitled to an overriding royalty interest in 1/16 of 7/8 of the oil, gas and other minerals produced from the 160-acre tract and for an accounting for his share of the oil and gas produced from such land by the defendants.

Before undertaking to state the conflicting claims asserted by the parties in such actions, we shall undertake to state the basic facts, which are not in dispute.

Lowder, at all times herein material, was the owner of the above described 160-acre tract. On June 3, 1953, she executed and delivered an oil and gas lease, running to H. S. Smith, for a primary term of 5 years, covering such 160 acres, hereinafter called the 5-year lease. It was duly recorded on July 9, 1954. It remained in effect during the primary term by the payment of delay rentals. On December 30, 1955, Smith assigned it to Haun. On December 30, 1957, Haun assigned it to Hurst, reserving an overriding royalty of "1/16 of 7/8ths of all oil, gas and casinghead gas produced, saved and marketed from" such 160 acres "under the provisions of" such "lease, or any extension or renewal thereof." The assignment provided that such overriding royalty should be free and clear of any cost and expense of development and operation, "excepting

taxes applicable to said interest and the production therefrom."

At the time of the assignment of the 5-year lease to Hurst, he also obtained a farmout from the Continental Oil Company of an adjoining 160-acre lease, called the Robinson lease, and purchased two adjacent leases known as the Austin and Telford leases, to form a development block of 640 acres.

The Meekers and their associates drilled a well on the Robinson lease. It was commenced May 8, 1958, and completed July 9, 1958, as a producing well.

On April 30, 1958, Lowder executed and delivered to Hurst the 30-day lease, in which she reserved a 1/8 royalty. It was duly recorded June 12, 1958. The lease provided it should remain in force for a term of 30 days from June 3, 1958, and for so long thereafter "as oil or gas or either of them is produced from said land by lessee," and if no well was commenced on the land before July 3, 1958, the lease would terminate.

By an assignment dated May 15, 1958, and duly recorded June 12, 1958, Hurst transferred to the Meekers an overriding royalty interest of 1/32 of 7/8 and 33/128 of the working interest in the 30-day lease. By the same instrument Hurst transferred to 16 other named assignees, apparently nominees of the Meekers, 31/128 of the working interest in the 30-day lease. By an assignment dated October 2, 1958, and duly recorded October 3, 1958, Hurst transferred to the Meekers an overriding royalty interest of 1/32 of 7/8 in the 30-day lease. By an assignment dated June 3, 1958, and duly recorded June 26, 1958, Hurst conveyed to Haun a 1/16 of 7/8 overriding royalty interest in the 30-day lease.

Edward E. Brook was the President of the Domestic Oil Corporation and American Drilling Company, Inc. He was the sole stockholder in American and owned about 75 per cent of the stock in Domestic It was stipulated at the pretrial conference that after Hurst acquired the 30-day lease, the Meekers and Brook agreed that each would own 1/2 of 15/16 of the 7/8 working interest in such lease and that thereafter Hurst conveyed to Edward E. Brook and the American Drilling Co., Inc., 1/2 of 15/16 of the 7/8 working interest and conveyed to the Meekers 1/2 of 15/16 of the 7/8 working interest. After the two last-mentioned transfers from Hurst were made, the Meekers, Brook and the American Drilling Company transferred to other parties fractional parts in their working interest in the 30-day lease. It was further stipulated at the pretrial conference held on September 7, 1960, that the Meekers then owned 27/128 x 15/16 of the 7/8 working interest in the 30-day lease and 27/128 x 29/32 of the 7/8 working interest in an oil and gas lease dated July 22, 1958, duly recorded August 14, 1958, running from Lowder to Ambassador, covering the 160-acre tract, and hereinafter called the Ambassador lease; that American then owned 3/16 x 15/16 of the 7/8 working interest in the 30-day lease and 93/512 x 29/32 of the 7/8 working interest in the Ambassador lease, and that Brook then owned 3/16 x 15/16 of the 7/8 working interest in the 30-day lease and 97/512 x 29/32 of the 7/8 working interest in the Ambassador lease. The remainder of the working interest was then owned by other persons by virtue of assignments from the Meekers, or American, or Brook.

On March 28, 1958, a contract was entered into between Hurst, Brook, as President of American, and the Meekers for the development of the land covered by the 30-day lease. A title opinion was furnished by Hurst to Meeker and Brook, which disclosed the overriding royalty

interest of Haun. It was the intention of the Meekers to develop the property under the 30-day lease thereafter to be acquired by Hurst.

On July 1, 1958, Hurst staked out a 10-acre location on the 30-day lease. On the same day, the Beck Construction Company was ordered to do certain work preliminary to drilling on the lease. Beck started work on the afternoon of July 1 and continued on July 2. It built a road, a circulating pit, and leveled the ground for the drilling rig at the 10-acre location. After the work was started on the 10-acre location, Hurst was advised that because the sand was only nine feet thick, a well on the 10-acre location would not be profitable. He then staked out a 20-acre location on the 30-day lease and Beck broke ground on the second location. All of this occurred on July 1 and July 2. On July 2, 1958, Hurst forwarded to the Oklahoma Corporation Commission a written notification of intention to drill on the 10-acre location and another notice of intention to drill on the 20-acre location. While the preliminary work was being carried on and on July 2, Sunray Mid-Continent Oil Company, which owned an oil and gas lease directly offsetting the 30-day lease to the south and east, called Hurst and objected to Hurst proceeding with the drilling of a well at either of such locations and requested him not to drill until a spacing order had been obtained from the Oklahoma Corporation Commission covering the area in which Sunray's lease and the 30-day lease were located.

It is fairly inferable from the testimony of Hurst that when Sunray objected on July 2, 1958, to the drilling of a well on the 10-acre and 20-acre locations that it advised Hurst it was going to make an application for the establishment of 40-acre drilling and spacing units. Hurst testified that he and his associates "wanted to go along with Sunray, because they were neighbors and would help develop this field."

On July 16, 1958, Sunray filed an application with the Oklahoma Corporation Commission for an order establishing 40-acre drilling and spacing units in the Southwest 1/4 of Section 13, the South 1/2 of Section 14, all of Section 23, the West 1/2 of Section 24, the Northwest 1/4 of Section 25, and the North 1/2 of Section 26, all in Township 16 North, Range 4 West, Logan County, Oklahoma. The application expressly stated that exceptions should be granted to "all wells drilled or drilling." Meeker and his associates and Sunray owned all of the oil and gas leases on such land. On September 2, 1958, the Oklahoma Corporation Commission entered its order establishing 40-acre drilling and spacing units for the above-described land, except for Robinson No. 1 Well, located on the Northeast 1/4 of the Northeast 1/4 of the Southwest 1/4 of such Section 23 and ordered that such well should be the permitted well for the unit on which it was located.

As a further reason for not proceeding with drilling a well on the 30-day lease, Hurst testified that had the Meekers and their associates proceeded with the drilling of the well on the 20-acre location while the Sunray spacing application was pending before the Corporation Commission and had the Corporation Commission thereafter entered a 40-acre spacing order, the Commission would have penalized the well on the 20-acre location by reducing its allowable. Meeker testified that they would have been penalized on their allowable, had they proceeded with the well while Sunray's application was pending.

Late in August, 1958, Lowder Well No. 1 was staked at a new location on the Southwest 1/4 of the Northeast 1/4 of Section 23, Township 16 North, Range 4 West. It was spudded in on September 7, 1958, and on September 9, 1958, it had reached a depth of 2,057 feet. Hurst had represented to Domestic that he had obtained from Lowder

an extension of the 30-day lease, until October 1, 1958. Such extension had not been given. On September 9, 1958, a representative of Ambassador notified Brook and Domestic that Ambassador had a lease on the 160-acre tract. Domestic then shut down operations and advised Hurst of Ambassador's claim. Brook and Hurst consulted Mr. C. D. Stinchecum, who was Domestic's attorney, and he advised them he was fearful the 30-day lease had expired for failure to continue the drilling of the well on either the 10-acre or 20-acre location with due diligence. Stinchecum also advised Brook to endeavor to work out an arrangement with Ambassador that would protect the interest of Brook and his associates.

On September 10, 1958, Hurst entered into negotiations with Ambassador. On that date an oral agreement was reached between Hurst and Ambassador, by which Ambassador agreed to transfer the Ambassador lease to Domestic, insofar as it covered the 160-acre tract, reserving to Ambassador a 3/32 of 7/8 overriding royalty interest, together with an oil payment of $2,500, payable out of 29/32 of 7/8 of the production. The agreement was consummated by an assignment from Ambassador to Domestic, executed September 15, 1958, and duly recorded September 30, 1958, in Book 390 at Page 592 of the Records of Logan County, Oklahoma.

Brook testified that Hurst made the agreement with Ambassador "for the benefit of everybody." We think it quite obvious that by the word "everybody" he meant the working interest owners. The owners of the working interest were tenants in common.[1] Brook owed a duty to

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1. *Earp* v. *Mid-Continent Petroleum Corporation*, ____ Okl. ____, 27 P.2d 855; *Moody* v. *Wagner*, ____ Okl. ____, 23 P.2d 633, 635; *Harper* v. *Ford*, ____ Okl. ____, 317 P.2d 210, 214.

his coowners of the working interest to protect their interests.[2] Each of the working interest owners received an assignment of approximately the same proportion of the working interest under the Ambassador lease as he owned in the working interest under the 30-day lease. No assignments of overriding royalty interests were made by Domestic or by owners of the working interest to the Meekers or to Haun.

The assignment from Ambassador to Domestic contained the following stipulation:

> "As an additional consideration for the assignment of the lease hereby assigned, Assignee hereby covenants and agrees:
>
> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; * * *."

Immediately after the oral agreement was made, Domestic resumed drilling Lowder Well No. 1 and completed it as a producing oil well on October 4, 1958.

On October 8, 1958, Domestic assigned to Charles and Sybil Meeker, as joint tenants, an undivided 1/2 of the 7/8 working interest in the Ambassador lease, insofar as it covered the 160-acre tract above described. The assignment contained this provision:

> "This assignment is made subject to the terms and provisions of the agreement dated October 8, 1958, between Assignor and Charles A. Meeker, and is subject to its proportionate part of an outstanding 3/32 overriding royalty interest and a $2,500.00 oil payment. By accepting this assignment assignees do

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2. 86 C.J.S., Tenancy in Common, § 59, p. 422, *et seq.*; *Wallace* v. *Brooks*, 194 Okl. 137, 147 P.2d 784, 790.

not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is subject to all of the provisions of the lease assignment from the Ambassador Oil Corporation to Domestic Oil Corporation recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma."

When Ambassador notified Domestic that it held a lease from Lowder on the land on which Domestic was drilling Lowder Well No. 1, Brook and Hurst undertook to contact Mr. Meeker at Albuquerque by telephone, ascertained he had gone to California, and were unable to locate him. A day or two after September 10, 1961, the date when the compromise agreement was reached with Ambassador, the Meekers were notified of the terms of such agreement. While Meeker expressed dissatisfaction with such compromise agreement, which was entered into for the benefit of all the working interest owners, he did not notify Brook, Domestic, or Ambassador that he repudiated the agreement, but stood by until the well was completed as a producing well. Thereafter, he accepted the assignment of October 8, 1958, from Domestic, in which he undertook to reserve his right to challenge the validity of Ambassador's lease, with full knowledge of the terms and provisions of the assignment from Ambassador to Domestic and the reservations therein contained. After the well came in, Meeker signed division orders on the basis of the Ambassador lease and the assignments thereof to Ambassador and the Meekers and the other owners of the working interest and received pipeline payments under such division orders.

The trial court held that the 30-day lease was an extension of the 5-year lease; that the operations on the 30-day lease on July 1, and 2, 1958, constituted the commencement of drilling of a well on such lease, but that

such lease expired prior to the commencement of Lowder Well No. 1, by reason of the lessees' failure to continue drilling operations with reasonable diligence. It also held that the Meekers were estopped to deny Ambassador's rights to the overriding royalty and the oil payment reserved to it in its assignment to Domestic.

It held that Haun's rights to his overriding royalty terminated when the 30-day lease expired and that Haun was not entitled by reason of any fiduciary relationship between him and Hurst, Brook, the Meekers and the other owners of the working interest to receive an overriding royalty of 1/16 of 7/8 of the oil and gas produced under the Ambassador lease. Judgment was entered accordingly and the Meekers and Haun have appealed.

I.

The Claims of the Meekers—No. 6822.

The first claim of the Meekers in Number 6822 is in substance an action to quiet title. The only interests in dispute are the Meekers' claim to an overriding royalty interest of 1/16 of 7/8 of the oil and gas produced under the 30-day lease and Ambassador's claim to an overriding royalty interest of 3/32 of 7/8 of the oil and gas produced and to an overriding royalty interest of 29/32 of 7/8 of the oil and gas produced until it has received $2,500 therefrom. The working interest is not in dispute. The Meekers' share of the working interest was substantially the same under the 30-day lease and under the assigned Ambassador lease. The Meekers requested a jury trial of their first and second claims in their second amended complaint. Their request was denied.

In Oklahoma the lessee's interest under an oil and gas lease is neither a corporeal nor a possessory interest in

the land. While it is a presently vested interest in the land of another, it is an incorporeal interest, or a profit a prendre.[3]

An oil and gas lease gives to the lessee an exclusive right—subject to legislative control to prevent waste, to secure the greatest ultimate recovery of oil and gas, and to protect correlative rights—to erect structures on the surface of the land covered by the lease, to explore for oil and gas by drilling wells through the underlying strata, to reduce to possession the oil and gas found and obtained through such wells, and thus acquire absolute title to such oil and gas as personal property.[4]

An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other costs incident to the production and sale of oil and gas produced from the lease.[5] It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest:[6]

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3. *Summers, Oil & Gas*, Perm. Ed., Vol. 1A, § 164, p. 433; *Rich* v. *Doneghey*, 71 Okl. 204, 177 Pac. 86, 89; *Commissioner of Internal Revenue* v. *McKinney*, 10 Cir., 87 F.2d 811, 813; *Francis* v. *Superior Oil Co.*, 10 Cir., 102 F.2d 732, 734; *United States* v. *Stanolind Crude Oil Producing Co.*, 10 Cir., 113 F.2d 194, 198.

4. *Rich* v. *Doneghey*, 71 Okl. 204, 177 Pac. 86, 89; *Ohio Oil Co.* v. *Sharp*, 10 Cir., 135 F.2d 303, 307; *United States* v. *Stanolind Crude Oil Purchasing Co.*, 10 Cir., 113 F.2d 194, 198.

5. Summers, Oil & Gas, Perm. Ed., Vol. 3, § 554, pp. 624, 626; *Thornburgh* v. *Cole*, ___ Okl. ___, 207 P.2d 1096, 1098.

6. *Phillips Petroleum Co.* v. *Oldland*, 10 Cir., 187 F.2d 780, 781; *Wright* v. *Brush*, 10 Cir., 115 F.2d 265, 267; *Keegan* v. *Humble Oil & Refining Co.*, 5 Cir., 155 F.2d 971, 973; *Thornburgh* v. *Cole*, ___ Okl. ___, 207 P.2d 1096, 1098.

It is generally held that an overriding royalty is an interest in real property.[7]

While ordinarily the overriding royalty reserved in the assignment of the lessee's working interest carves out a share of the lessee's interest in the oil and gas produced free from expense, in the absence of clear language manifesting an intent so to do, it does not create the relation of tenancy in common between the lessee and overriding royalty owner, nor give the latter the right to enter upon and develop the lease and produce oil and gase therefrom.[8]

It follows that the owner of an overriding royalty interest does not have a corporeal or possessory interest in land, which could be the subject of an action in ejectment.[9]

It is well settled that an action to quiet title is within the jurisdiction of a court of equity and as a general rule there is no right to a jury trial.[10] However, one out of

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7. Summers, Oil & Gas, Perm. Ed., Vol. 3, § 554, pp. 628-630; *Davis* v. *Lewis*, 187 Okl. 91, 100 P.2d 994, 996; *Danciger Oil & Refining Co.* v. *Burroughs*, 10 Cir., 75 F.2d 855, 857; *National Bank of Tulsa* v. *Warren*, 177 Kan. 281, 279 P.2d 262, 265.

8. *La Laguna Ranch Co.* v. *Dodge*, Cal. , 114 P.2d 351, 354, 355; *Chase* v. *Trimble*, D.C.A. Cal., 158 P.2d 247, 249; *Belgam Oil Co.* v. *Wirt Franklin Petroleum Corporation*, Tex. App. , 209 S.W.2d 376, 379.

9. See *Priddy* v. *Thompson*, 8 Cir., 204 Fed. 955, 960, and Oklahoma cases cited in Note 8, *infra*.

In Oklahoma an oil and gas lease passes no estate to the lessee that can be the subject of ejectment or other like action, *Kolachny* v. *Galbreath*, 26 Okl. 772, 110 Pac. 902; *Brennan* v. *Hunter*, 68 Okl. 112, 172 Pac. 49, 50, and the Oklahoma courts hold that a court of equity has jurisdiction to settle the validity and priority of oil and gas leases between contesting lessees, where such leases have been executed by a common landowner. *Gypsy Oil Co.* v. *Marsh*, 121 Okl. 135, 248 Pac. 329, 331.

10. 50 C.J.S., Juries, § 33, p. 748.

possession may not maintain an action in the Federal courts in an action to quiet title against one in possession if an action in ejectment would afford a plain, adequate and complete remedy at law.[11] But Ambassador is not in possession and it has no possessory right under the overriding royalty reserved in its assignment and neither an action in ejectment nor other legal action against Ambassador would afford a plain, adequate and complete remedy at law to the Meekers.[12]

Accordingly, we conclude that the Meekers' first claim in their second amended complaint was a suit in equity and that they were not entitled to a jury trial on such claim.

The Meekers assert that the trial court erred in holding that the owners of the working interest under the 30-day lease failed to continue with due diligence the drilling of the well commenced during the primary term of such lease.

Due diligence is measured by what a reasonably prudent operator would do under the existing facts and circumstances, having regard for the interest of both the lessor and the lessee.[13]

The term of the Lowder 5-year lease expired on June 3, 1958. Prior to that date, none of the owners of the

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11. *Harlan* v. *Sparks*, 10 Cir., 125 F.2d 502, 505-506; *Humble Oil & Refining Co.* v. *Sun Oil Company*, 5 Cir., 191 F.2d 705, 718; *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551, 555.

12. *Humble Oil & Refining Co.* v. *Sun Oil Company*, 5 Cir., 191 F.2d 705, 713.

13. *Trust Co. of Chicago* v. *Samedan Oil Corp.*, 10 Cir., 192 F.2d 282, 284; *Denker* v. *Mid-Continent Petroleum Corporation*, 10 Cir., 56 F.2d 725, 727; *Broswood Oil & Gas Co.* v. *Mary Oil & Gas Co.*, Okl. , 23 P.2d 387, 389; *Ramsey Petroleum Corporation* v. *Davis*, Okl. , 85 P.2d 427, 429; *Newell* v. *Phillips Petroleum Co.*, 10 Cir., 144 F.2d 338, 339.

working interest had done anything toward the development for oil and gas of the land covered by the lease. Realizing that the 5-year lease was about to expire, Hurst, in April, 1958, requested Lowder to give him the 30-day lease. Lowder complied with the request and executed the 30-day lease, the primary term of which terminated on July 3, 1958. From the shortness of the primary term and other surrounding facts and circumstances, it is reasonable to infer that Lowder and Hurst contemplated that the owners of the working interest under such lease would promptly and without further delay develop the land for oil and gas, acting with diligence and dispatch.

Within the primary term of the 30-day lease, the owners of the working interest did nothing more than stake out two drilling sites, construct roads and dig certain pits. Thereafter, they did nothing further until the latter part of August, 1958. They seek to excuse the delay by the fact that Sunray objected to the drilling of the well on the 30-day lease at either the 10-acre or 20-acre location and because of Sunray's pending application for a spacing order.

In its application Sunray expressly stated that exceptions should be granted to all wells drilled or drilling within the area described in the application. The order of the Commission excepted the Robinson well and provided that it should be the permitted well for the unit on which it was located. Had the owners of the working interest continued the drilling of the well on the 20-acre location, commenced by them during the primary term of the lease, while the spacing application was pending, it is a reasonable assumption that such well would have been excepted from the spacing order. Moreover, as an alternative course, when Sunray objected to either the 10-acre or 20-acre location, they

could have, within the primary term of the 30-day lease, proceeded with work on a 40-acre location that would have constituted the commencement of the drilling of a well; and when, thereafter, on July 16, 1958, Sunray applied to the Oklahoma Corporation Commission for the order establishing a 40-acre drilling and spacing unit, they could have proceeded safely with the drilling of the well on the 40-acre location. Because the producing sand was only about eight feet thick, it would not have been feasible or economical to drill wells in the area on a spacing unit of less than 40 acres and one well would drain the recoverable oil from the formation underlying 40 acres. The Corporation Commission so found in its spacing order. We are of the opinion there was no reasonable excuse, under the facts and circumstances, for the Meekers and their associates failing to proceed with the drilling of a well, either on a 20-acre or 40-acre location on the 30-day lease, while Sunray's application was pending. The trial court applied the correct test and we cannot say that his finding that, under the existing facts and circumstances, the owners of the working interest in the 30-day lease failed to proceed with due diligence with the drilling of the well, which they commenced within the primary term, was erroneous. Accordingly, we conclude that the trial court correctly held that the 30-day lease expired by reason of the failure of Meeker and the other owners of the working interest to continue the drilling of an oil and gas well with reasonable diligence after the expiration of the primary term of the lease.

The Meekers would have been entitled to a jury trial upon proper and timely request therefor of any issues remaining for determination on their second claim. However, the trial court, in the exercise of its equity jurisdiction, had determined that the 30-day lease had terminated

and that the Meekers had no title to any interest under such lease. Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' second claim.

The Meekers, with full knowledge of the facts, stood by and permitted American to continue the drilling of Lowder Well No. 1 under the provisions of the assignment from Ambassador to Domestic. Their working interest under the 30-day lease was in jeopardy, due to the fact that such lease may have terminated by the failure to diligently continue drilling of the well commenced during the primary term of such lease, an event which the trial court later held had happened. Their working interest was safeguarded and the risk of continuing the drilling of Lowder Well No. 1 under a doubtful title was eliminated by the assignment from Ambassador to Domestic, taken for the benefit of the Meekers and other owners of the working interest. Moreover, the Meekers signed division orders on the basis of their interest under the Ambassador lease and received payments in accordance with their working interest under such lease. From the foregoing, it will be seen that the Meekers accepted benefits under the Ambassador lease, with full knowledge of the facts, and we agree with the trial court that they thereby ratified the assignment from Ambassador to Domestic and are bound by the provisions thereof. A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.[14]

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14. 31 C.J.S., Estoppel, § 109 a., p. 347; 15 Okl. St. Anno., § 75; *Federal Mining & Engineering Co.* v. *Pollak*, Nev. , 85 P.2d 1008, 1012; *Wood Naval Stores Exp. Ass'n* v. *Latimer*, Miss. , 71 So.2d 425, 430; See also, *Elsey* v. *Wagner*, 199 Okl. 449, 183 P.2d 829, 830.

II.

The Haun Claim—No. 6823.

The Haun claim is predicated on the contention that a fiduciary relationship existed between Haun, on the one hand, and Hurst, Brook, and Meekers and other owners of the working interest under the 30-day lease, on the other hand; and that by reason thereof the latter were obligated to protect the rights of Haun in any extension or renewal of the 30-day lease and that Haun was entitled to an overriding royalty of 1/16 of the working interest acquired by assignments of the Ambassador lease.

Ordinarily, an overriding royalty reserved in an assignment of a lease does not survive the termination of the assigned lease.[15] The mere assignment of an oil and gas lease does not create a fiduciary relationship between the assignor and the assignee.[16] However, such a relationship may arise by virtue of additional provisions in such assignment or in a contemporaneous agreement.[17]

We hold there was no fiduciary relationship between Haun and the owners of the working interest when the Ambassador lease was assigned to Domestic or at any time thereafter.

We are of the opinion that the cases principally relied upon by counsel for Haun are clearly distinguishable on

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15. Summers, Oil & Gas, Perm. Ed., Vol. 3, § 554, pp. 634-637; *Wier* v. *Glassell*, 216 La. 828, 44 So.2d 882, 887, 888; *Keese* v. *Continental Pipeline Company*, 5 Cir., 235 F.2d 386, 388; *Phillips Petroleum Company* v. *McCormick*, 10 Cir., 211 F.2d 361, 364; *La Laguna Ranch Co.* v. *Dodge*, ... Cal. ....., 114 P.2d 351, 355.

16. Summers, Oil & Gas, Perm. Ed., Vol. 3, § 554, p. 635.

17. Summers, Oil & Gas, Perm. Ed., Vol. 3, § 554, pp. 637-641.

the facts from the instant case, as we shall now undertake to show.

In *Probst* v. *Hughes*, ... Okla. ....., 286 P. 875, the facts were these: An overriding royalty was reserved in an assignment of an oil and gas lease. The assignment provided: "This reservation shall likewise apply as to all modifications, renewals of such lease or extensions that the assignee, his successors or assigns may secure." Thereafter, the assignee developed the lease for gas and gas was produced from the leased premises subsequent to the primary term of the lease, but such production ceased on June 1, 1924. However, on April 23, 1924, and while the lease was still in force and effect, the assignees made an annual payment under the lease for gas produced therefrom. The court held that such payment, notwithstanding the cessation of production, continued the lease in effect until after November 10, 1924. On the latter date, the assignees secured another lease of the land covered by the original lease from the grantees of the original lessor. The court held that a fiduciary relationship existed between the assignors and assignees; that the new lease was, in effect, an extension of the original lease, and that the new lease was charged with the overriding royalty reserved to the assignors in the original lease. In the instant case, a thir party, who was a stranger to owners of the working interest in the 30-day lease, obtained the second lease and the assignment to Domestic took place after the 30-day lease had terminated.

In *Rees* v. *Briscoe*, ... Okl. ....., 315 P.2d 758, the court held that under the facts a fiduciary relationship existed between the assignor of oil and gas leases, who reserved an overriding royalty, and the assignee thereof, and that such assignor was entitled to an overriding royalty

under a second lease secured by the assignee. In that case Rees, the original lessee in oil and gas leases, assigned the leases as to two tracts covered thereby, reserving an overriding royalty. On the same date the assignment was made, the assignee executed an agreement whereby it agreed it would commence drilling operations on one of the two tracts, on or before a specified date and drill to the Partlesville sand. The assignee did commence such well and it was completed as a producer. Rees's leases covered 70/80 of the minerals in a third tract. While the assignee was engaged in drilling such well, Rees transferred the leases as to such third tract to such assignee. The last assignment reserved an overriding royalty, but did not contain a specific provision obligating the assignee to develop the third tract. However, the assignee orally promised the assignor to develop and drill wells on such third tract before the expiration of the leases. The assignee failed so to do, but while such leases were in force and unexpired, obtained a renewal lease on such third tract. It did not provide for an overriding royalty for the assignor. At the time the assignee was attempting to obtain the renewal of the leases, the owners of the minerals offered a renewal lease to the assignor, who declined it in favor of the assignee. After it obtained the renewal lease, the assignee drilled and obtained production on the third tract.

The facts in *Rees* v. *Briscoe* are materially different from the facts in the instant case, in that here there was no express agreement, oral or written, obligating Hurst or his successors to drill and develop either the 5-year lease or the 30-day lease; no such agreement may be implied from the assignment of an oil and gas lease, which reserves an overriding royalty;[18] Haun did not have an opportunity

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18. *Kile* v. *Amerada Petroleum Corporation*, 118 Okl. 176, 247 Pac. 681, 683; *Phoenix Oil Co.* v. *Mid-Continent Petroleum Corporation*, 60 P.2d 1054, 1061.

to obtain a renewal lease from Lowder and hence did not waive such an opportunity in favor of Hurst and his successors in reliance upon the justified belief that they would protect his overriding royalty interest in any renewal lease; and the assignment to Domestic was made after the 30-day lease had expired.

In *Oldland* v. *Gray*, 10 Cir., 179 F.2d 408, the facts were these: In 1926, a group referred to in the opinion as the Oldland Group assigned their original prospecting permit on 1,760 acres of public lands, issued under the 1920 Leasing Act, 30 U.S.C.A., § 181, *et seq.*, to one McLaughlin. The assignment provided that in the event leases were issued to the assignee under the permit and production was obtained, McLaughlin would pay to the Oldland Group a stipulated percentage of the market value of the oil and gas produced and saved from the leases. In the assignment McLaughlin expressly agreed "to carry on such drilling and operations on the said permit area as to fulfill the terms and conditions of the said permit within the period herein prescribed or any extensions thereof" and in such assignment it was further agreed that McLaughlin should have the right to terminate the agreement and discontinue operations, provided that on abandonment he would quitclaim all his right, title and interest in the permit to the Oldland Group and, if on the date of the reassignment he had not complied with the drilling requirements of the permit, he would pay them $2,000. In 1938 McLaughlin applied for a lease in exchange for the prospecting permit, as contemplated by the 1935 amendment to the 1920 Leasing Act, 49 Stat. 674. Such amendment authorized the holder of a valid prospecting permit to "exchange the same for a lease to the area described in the permit without proof of discovery, at a royalty of not less than 12-1/2 per centum." In 1939 the exchange lease

was issued to him. In his application therefor, McLaughlin acknowledged by affidavit the interests of the Oldland Group in the permit and stated that such right would be transferred to any lease granted. In approving the issuance of the lease, the Commissioner of the Land Office expressly recited that it was granted in lieu of the existing permit. Thereafter, the lease was transferred by McLaughlin to Gray and one Levison, with knowledge of and subject to the conditions in the permit. In 1943 and before the expiration of the 5-year exchange lease, Levison and Gray applied for and received a new lease, covering the same area, based upon the preference rights granted to them by the amendment to the Leasing Act of July 29, 1942, 56 Stat. 726, which new lease was thereafter assigned to the Phillips Petroleum Company. McLaughlin did not drill the wells, as required by the permit, but kept the permit alive in the name of his assignors. Phillips took the assignment of the new lease with knowledge of McLaughlin's obligation under the original assignment of the underlying permit. The court held that a fiduciary relationship existed between the Oldland Group and McLaughlin and his successors in interest and that the Oldland Group were entitled to a royalty on the production from the new lease, as provided in the assignment of the permit.

Thus it will be seen that in *Oldland* v. *Gray*, there was an express agreement by the assignee to drill and develop, and, as between the parties, the exchange lease took the place of the permit and was subject to the right reserved by the Oldland Group in the permit, and the new lease was obtained during the time the exchange lease was in effect and was a renewal or extension thereof,—factual elements not present in the instant case.

The owners of the working interest proceeded with the drilling of Lowder Well No. 1 in the belief that the 30-day lease was still in force and effect. Their failure to more diligently continue the drilling of the well commenced during the primary term of the 30-day lease was not due to bad faith on their part. They acted in good faith in securing the assignment of the Ambassador lease.

Since the 30-day lease had terminated before the assignment of the Ambassador lease to Domestic for the benefit of the owners of the working interest, and such lease was obtained by a stranger to the owners of the working interest in the 30-day lease, neither the Ambassador lease nor the assignment thereof could constitute an extension or renewal of a lease that had theretofore terminated and no longer existed. That conclusion is supported by the decision of the Supreme Court of Kansas in *K & E Drilling, Inc.*, v. *Warren*, 185 Kan. 29, 340 P.2d 919, under facts not materially different from the facts in the instant case.

Accordingly, we hold, as did the trial court, that there was no extension or renewal of the 30-day lease and that Haun's rights terminated on the expiration and termination of that lease.

The judgment entered in the consolidated cases is affirmed.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 46

CHARLES A. MEEKER and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1963.

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 641

CHARLES A. MEEKER and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Although the facts are stated in the Opinion of the Court of Appeals (308 F.2d 875), we will briefly restate the facts.

Hettie E. Lowder owned the NW/4 and W/2 NE/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 240 acres.

On June 3, 1953, Hettie E. Lowder executed and delivered a five-year oil and gas lease to H. S. Smith, covering the E/2 NW/4 and W/2 NE/4 of Section 23-16N-4W, containing 160 acres. By mesne assignments, this lease was

assigned to W. G. Haun. On December 30, 1957, Haun assigned the lease to Herman L. Hurst, reserving an overriding royalty of 1/16th of 7/8ths, which said overriding royalty was expressly made applicable to any extensions or renewals of this lease.

On April 30, 1958, Hurst procured from Hettie E. Lowder an oil and gas lease (covering the same 160 acres) having a term of thirty (30) days from June 3, 1958. This lease was recorded in Book 385, page 694. In recognition of his override, Hurst assigned to Haun a 1/16th of 7/8ths overriding royalty under this thirty (30) day lease.

Prior to procuring the thirty (30) day oil and gas lease mentioned in the preceding paragraph, Hurst had entered into an agreement with Domestic Oil Corporation, American Drilling Company (an affiliate of Domestic Oil Corporation) and the Meekers, whereunder a test well was to be drilled on the Robinson farm which was situated near the Lowder farm. The Robinson farm covers the SW/4 of Section 23-16N-4W. The thirty (30) day Lowder lease had been procured by Hurst for the benefit of Domestic Oil Corporation, Hurst and the Meekers. Both the Meekers and Domestic had sold out small interests in the leasehold estate to various parties.

On July 1, 1958 (two days before the expiration of the primary term of the thirty [30] day lease), at the request of Hurst a well location was staked on the Lowder farm, and some bulldozer work was done. Nothing was done thereafter at this particular location.

On July 22, 1958, Hettie E. Lowder executed and delivered to Ambassador Oil Corporation, in consideration of a cash bonus, an oil and gas lease covering the entire Lowder farm, containing 240 acres. This lease was recorded August 14, 1958, in Book 388, page 639.

In the latter part of August, 1958, Domestic Oil Corporation, apparently in ignorance of the Ambassador lease, and apparently believing that the thirty (30) day lease was still effective, caused a well location to be staked on the SW/4 NE/4 in Section 23-16N-4W, and on or about September 7, 1958, spudded a well exploratory for oil and gas at this location. As noted hereinabove, this location was at a different location than the well staked by Hurst.

Ambassador, upon learning that Domestic was drilling on the Lowder farm, notified Domestic that Ambassador owned the oil and gas leasehold estate covering said land. Upon receipt of this notice, Domestic stopped drilling. Domestic's attorney was consulted, and he advised that the thirty (30) day lease was probably dead. Negotiations were commenced between Ambassador and Hurst, and as a result of these negotiations Ambassador assigned its oil and gas lease to Domestic insofar as said lease covered the E/2 NW/4, and W/2 NE/4 of Section 36-16N-4W. The assignment from Ambassador to Domestic is dated September 15, 1958, and was recorded September 30, 1958, in Book 390, page 592. The assignment contained this provision:

> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; . . ."

After receiving the assignment of the Ambassador lease, Domestic resumed drilling of the well on the Lowder farm, and, subsequently, the well was completed as a producing oil well.

On October 8, 1958, Domestic Oil Company assigned to Charles A. Meeker and Sybil Meeker, as joint tenants, an undivided one-half interest in the Ambassador lease insofar as the lease covers the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. This assignment contained this provision:

> "This assignment is made SUBJECT to the TERMS AND PROVISIONS of the agreement dated October 8, 1958, between Assignor and CHARLES A. MEEKER and is SUBJECT to its proportionate part of an outstanding 3/32 OVERRIDING ROYALTY INTEREST and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is SUBJECT to all of the provisions of the lease assignment from the AMBASSADOR OIL CORPORATION to DOMESTIC OIL CORPORATION recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma."

ARGUMENT

1. The decision below is in accord with the controlling decisions of this Court.

The Second Amended Complaint upon which this action was tried stated two causes of action: the first, to quiet title under the 30-day oil and gas lease; the second, for money damages for slander of title to that lease.

Jury trial was demanded by endorsement on the Complaint, but was denied on the ground that the action was essentially an equitable action.

At the time the action was filed, and at the time the action was tried, the plaintiffs and their co-owners were in possession of the property producing oil and gas therefrom. The plaintiffs were among the working interest owners. They were also the owners of an overriding royalty. This was true whether the 30-day oil and gas lease was established as the valid lease or whether the Ambassador lease was established as the valid lease.

The trial court found that, as a matter of law, the 30-day oil and gas lease terminated for want of diligent development, and this finding was sustained by the Court of Appeals.

The plaintiffs admitted that no operations had been conducted between July 2 and the latter part of August. They sought to excuse this lack of diligence for a legal reason: namely, a possibility of well spacing by the Oklahoma Corporation Commission. Both the trial and the appellate court held that the mere possibility that the Corporation Commission might space the area for drilling for and the production of oil and gas did not constitute a valid reason for failure to pursue the drilling operations with due diligence. That the mere possibility of the establishment of drilling and spacing units would not prohibit drilling or constitute a legal excuse for drilling, seems obvious

The plaintiffs were not entitled to a jury trial in the quiet title action. Plaintiffs, together with their co-owners

of the working interest, were in possession of the land covered by the oil and gas lease producing oil and gas therefrom. In addition to this, an Oklahoma ejectment will not lie to enforce rights under an oil and gas lease when the lessee has not been in possession. *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551, 36 S. Ct. 711, 60 L. Ed. 1161; *Frey* v. *Glenn*, 206 Okla. 28, 240 P.2d 1061 (1952). Therefore, the plaintiffs neither could nor were required to bring an action in law in ejectment. They could proceed in equity.

An action to quiet title is an equitable action. *Perego* v. *Dodge*, 163 U.S. 158, 41 L. Ed. 113 (1896); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Humble Oil & Refining Company* v. *Sun Oil Company*, 191 F.2d 705 (C.C.A. 5th, 1951); *Hester* v. *Watts*, 203 Okla. 97, 218 P.2d 641 (1950).

A jury trial is not a matter of right in an equitable action. *Parsons* v. *Bedford*, 28 U.S. (3 Peters) 433, 7 L. Ed. 732 (1830); *Barton* v. *Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation*, 124 F.2d 563 (C.C.A. 2d 1942); 31 Am. Jur., Jury, Sec. 24.

A Court of Equity having taken jurisdiction will retain jurisdiction in order to grant complete relief. *Camp* v. *Boyd*, 229 U.S. 530, 33 S. Ct. 75, 57 L. Ed. 1317 (1912); *Barton* v. *Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881); *Schaefer* v. *Gunzburg*, 246 F.2d 11, 15 (C.C.A. 9th, 1957) (*cert. denied* 355 U.S. 831, 2 L. Ed.2d 43); 5 Moore's Federal Practice,

2nd Ed., paragraph 38.19(2), page 169; 19 Am. Jur., Equity, Secs. 125, 127, pages 125 and 126.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 918 (1936), this Court speaking through MR. CHIEF JUSTICE HUGHES, said:

> "The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . (citing cases). Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law . . . (citing cases)."

Under the law of Oklahoma, the claim for money damages would be treated as incidental to the quiet title suit. *Russell* v. *Freeman*, 202 Okla. 421, 214 P.2d 443 (1950). There would be no jury trial.

Having evoked the aid of equity to establish the very right upon which their claim for damages depends, the plaintiffs should not be heard to urge that the court, without the intervention of a jury, had no right to consider the case. If the claim for damages can be decided only by a jury, and if the claim for damages must be heard either prior to a determination of the equity question, or simultaneously therewith, manifestly it would be impossible for the case to be tried except by a jury. In effect every equitable action, by the assertion of a claim for damages, would

be transformed into a jury action. We submit that this result is not desirable, or workable. We submit that if a case is one that is predominately equitable, it should be tried by the court, with or without an advisory jury, as the trial court determines.

We submit that the right to a jury trial should be governed by determining whether the basic character of the action is legal or equitable. This Court has recognized this principle as is shown by the cases cited. This is the rule in Oklahoma as is shown by *Russell* v. *Freeman, supra.* It seems to be the test which is applied in most jurisdictions. 31 Am. Jur., Jury, Secs. 24 and 25.

This philosophy was expressed in *Institutional Drug Distributors* v. *Yankwich*, 249 F.2d 566, 569 (C.C.A. 9th, 1957), wherein the Court said:

> "It is not on every complaint now filed that a jury trial is accorded, even if there are issues normally triable at law and even if there is the requisite demand therefor. The Federal Rules of Civil Procedure did not change these principles, but affirmed them, since specific reference is made to the Seventh Amendment. A law action may be pleaded in the same complaint as a suit in equity. But, if the whole matter fall within the limits of equity jurisdiction, even separate statement and timely demand will not suffice. It is obvious also that although an independent counter-claim can be, and often must be pleaded under the Rules, it does not change the limits of equity jurisdiction."

Any other rule leads to procedural difficulties which are profound. If all questions of fact which relate to an

incidental issue in an equitable action, which, if unrelated, would have been triable to a jury at common law, must be segregated and submitted to a jury, procedural chaos results. The end result of such a rule will be the impanelment of a jury in every case; in cases which are basically equitable, a needless imposition upon the time of citizens who are compelled to serve upon an unnecessary jury.

There was no right to a jury trial in an equity action in England, and the Seventh Amendment guaranteed none, for, as we all know, the right to a jury trial was preserved in this nation as it had heretofore existed in England.

Although *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), have no application to the facts of this case, there is *dicta* in those opinions which might encourage one to make the assertion that the petitioners make in their brief (page 8): "As long as any legal cause is involved, the jury rights it creates control." We submit that this is not the law despite the *dicta* in these two cases, and we further submit that it ought not to become the law.

2. The denial of a jury trial on the second cause of action was, at the most, harmless error.

Under all the precedents, a quiet title action is an equity action triable to the court. Unless this Court holds that the trial court had no power to try the quiet title action, prior to trying the claim for slander of title, it is obvious that the case would never have reached the jury. The plaintiffs had no title; therefore, there could have been no

slander of title. Had a jury been impaneled, it would have served no function but to render a directed verdict.

Had the plaintiffs omitted from their complaint all reference to quieting title, and sued solely for slander of title, they would have been forced to prove their title as a condition of recovery. And had the case proceeded in this fashion, the trial court would have directed a verdict for the defendant. The trial court would have been compelled to hold that failure to pursue drilling operations under the 30-day lease with due diligence caused the lease to terminate as a matter of law. *Gillespie* v. *Dougherty*, 179 Okla. 330, 65 P.2d 486 (1937); *Moore Oil Inc.* v. *Snakard*, 150 F. Supp. 250 (Okla. W. D., 1957). There were admittedly no operations under the 30-day lease for a period of nearly 60 days after the expiration of the primary term, and the lease died as a matter of law.

The court may direct a verdict where the plaintiff fails to prove a case. *Galloway* v. *U. S.*, 319 U.S. 372, 389, 87 L. Ed. 1458, 1470 (1942); *New Haven & Hartford Ry. Co.* v. *Henagan*, 364 U.S. 441, 5 L. Ed.2d 183 (1960).

Harmless error is to be disregarded. 28 U.S.C.A., Sec. 2111; Rule 61, Federal Rules of Civil Procedure.

Denial of a jury trial is harmless error where there was no question to submit to the jury. *Forster* v. *Insurance Co. of N. Am.*, 139 F.2d 875 (C.C.A. 2d, 1944); *Freeman Contracter's Inc.* v. *Central Surety and Insurance Corporation*, 205 F.2d 607 (C.C.A. 8th, 1953); *Orenstein* v. *U. S.*, 191 F.2d 184 (C.A. 1st, 1951); *Tanimura* v. *U. S.*, 195 F.2d 329 (C.A. 9th, 1952).

The primary term of the 30-day oil and gas lease expired July 2, 1958. As pointed out in the Opinion of the Court of Appeals (A 17 of the Petition):

> "Within the primary term of the 30 day lease, the owners of the working interest did nothing more than stake out two drilling sites, construct roads and dig certain pits. Thereafter, they did nothing further until the latter part of August, 1958."

The court found that there was nothing to excuse the lack of diligence on the part of the plaintiff and concluded that the 30-day lease had terminated. On admitted facts the trial court held that the lease had terminated as a matter of law. Issues of law are to be resolved by the court. *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 661, 79 L. Ed. 1636, 1638 (1935).

As a matter of fact, it seems that the trial court should have sustained defendant's motion for summary judgment. The assignment of the Ambassador lease provided that the 30-day lease had terminated and contained a specific recognition that Ambassador lease was a valid and effective oil and gas lease. The plaintiffs accepted an assignment of an interest in Ambassador lease which provided that it was subject "to all the provisions of the lease assignment from Ambassador Oil Corporation to Domestic Oil Corporation . . ." and they are bound thereby.

The general rule as to estoppel by deed is recited in 31 C.J.S., "Estoppel," Sec. 37, page 213, as follows:

> "As a general rule, all parties to a deed, and those claiming through them, are bound by the recitals in it legitimately appertaining to the subject matter of it. Recitals of matter of fact in a deed are ordinarily bind-

ing on the grantor; and, in addition, they are *binding on the grantee and his successors in estate* if they claim under the deed, but not otherwise. Such recitals do not bind mere strangers or those who claim by title paramount to the reciting deed." (Emphasis ours.)

In further elaboration of the rule at page 214, it is said:

"Particular recitals, on the other hand, are such as definitely affirm or deny the existence of some fact and either expressly or impliedly show a clear intention of the parties that either one or the other or both shall be precluded from asserting anything to the contrary; these recitals are binding."

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February, 1963.

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IN THE

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OCTOBER TERM, 1962.

No. [redacted] 46

CHARLES A. MEEKER and his wife,
SYBIL MEEKER,
Petitioners,

vs.

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE PETITIONERS

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IN THE

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OCTOBER TERM, 1962.

No. 641

CHARLES A. MEEKER and his wife,
SYBIL MEEKER,
Petitioners,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is numbered 308 F.2d 875, and is included in the Transcript of Record (R. 53-72).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1). The judgment of the Court of Appeals was entered on September 10, 1962. The Petition for Writ of Certiorari was filed on December 6, 1962, and was granted on March 4, 1963.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions and rules involved, all of which are set forth in the Appendix, are:

Constitution of the United States, Seventh Amendment.

28 U.S.C. 1254 (1).

28 U.S.C. 2201.

Rule 57, Rules of Civil Procedure for the United States District Courts.

Okla. Stat., Tit. 15, Sec. 75 (1951).

Okla. Stat., Tit. 16, Sec. 11 (1951).

QUESTIONS PRESENTED

I. Where the plaintiffs set forth two causes of action in a complaint, the first one being an action to establish title to certain oil interests claimed, and for an accounting, and the second for money damages based upon slander of title and interference with contract rights, with a timely demand for a jury trial endorsed thereon, may the plaintiffs be deprived of a jury trial on the basis that the action is equitable or that a determination of the issues of the quiet title action will dispose of the issues in the second cause of action?

II. Were the petitioners estopped or validly prohibited from contesting the claim of the respondent to the oil interests involved where the petitioners claimed ownership under a chain of title to which the respondent was a stranger, but had also accepted a quitclaim conveyance from a party who obtained its interests from respondent, and in the latter conveyance the petitioners expressly reserved their right to contest the validity of the respondent's claim, and, after having obtained both conveyances, the petitioners enjoyed certain benefits from the property purportedly conveyed by both instruments?

STATEMENT OF THE CASE

The petitioners, Charles A. and Sybil Meeker, were plaintiffs in the district court action and the respondent, Ambassador Oil Corporation, was one of the defendants.

Petitioners brought suit against the respondent, and others, in the United States District Court for the Western District of Oklahoma. The jurisdiction of the District Court was founded upon diversity of citizenship of the parties and on an amount in controversy exceeding the sum of $10,000.00 (R. 2-3).

The trial court found in favor of the defendant, and was sustained on appeal to the United States Court of Appeals for the Tenth Circuit.

The complaint upon which this action was based contained two causes of action. The first was to establish title of the petitioners to the oil and gas leasehold interests claimed and asked for an accounting of amounts received by the respondent, and the second was a tort action for money damages based upon interference with contract rights, and libel and slander of title to the leasehold in-

terests involved. A demand for a trial by jury was made by endorsement on the complaint (R. 2-8).

The trial court denied the demand for a jury trial on the ground that the action was equitable, and overruled the petitioners' motion to reconsider the denial of a jury trial (R. 14, 15).

Hettie E. Lowder was the surface landowner of the property in question, and on June 3, 1953, she executed a five year oil and gas lease to H. S. Smith, who assigned the lease to W. G. Haun on December 30, 1955; and on December 30, 1957, W. G. Haun assigned his interest in the lease to Herman L. Hurst, for no cash consideration, reserving a 1/16 of 7/8 overriding royalty interest (R. 16).

On April 30, 1958, Herman L. Hurst procured another oil and gas lease on this property, dated June 3, 1958 (Pl. Ex. 1; R. 24-25, 47-48). By an instrument dated May 15, 1958, and recorded June 12, 1958, Hurst transferred to the petitioners a 1/32 overriding royalty and a 33/128 working interest, Hurst and his wife retaining a 1/32 overriding royalty (Pl. Ex. 2; R. 25, 48-50). On October 2, 1958, Hurst conveyed to Meekers all of his remaining interests in the lease (Pl. Ex. 3; R. 25, 51).

On July 22, 1958, the respondent, Ambassador Oil Corporation, obtained another oil and gas lease on the same property from Mrs. Lowder (R 4, 9). When obtaining this lease, the respondent knew that the Hurst lease was of record, and that the Hurst-Meeker group had already brought in the Robinson well on directly offsetting acreage, but did not contact Hurst or Meeker to obtain releases (R. 29, 38, 39, 40, 44, 45). The Hurst-Meeker group was swabbing oil in the Robinson well on June 16, 1958, and it was completed as a producer on July 9, 1958 (R. 39).

The undisputed testimony shows that it is the practice and procedure in the oil business in that area to obtain releases from holders of prior leases, when obtaining a subsequent lease on property (R. 29, 39, 40).

The trial court found that the Lowder well, on the property in question in this case, was commenced during the primary term of the 30-day lease under which the petitioners claim, but that the lease thereafter terminated for failure to continue the drilling operations with due diligence (R. 19).

Hurst initiated the drilling operations on the lease just prior to July 3, 1958 (R. 16, 19). Shortly after the work was commenced, a disagreement arose with Sunray Oil Company, who had adjoining acreage, as to well spacing, and operations were discontinued, except for some preliminary work done in August, until the Corporation Commission gave a ruling on spacing, on September 2, 1958, at which time the drilling operations were immediately resumed and a producing well was brought in (R. 17, 27, 28, 38).

The first time that the petitioners or any of their group knew of the claim of Ambassador Oil Corporation was on September 9, 1958, when the well was drilled past 2,200 feet (R. 17, 28, 29). When the claim of Ambassador Oil Corporation was made known, Hurst negotiated a purported settlement of the dispute, at the direction of Domestic Oil Corporation, who was then engaged in the actual drilling for the Meeker group, but without knowledge or authorization of Meeker, and the well was continued under the new arrangement (R. 17, 18, 31, 35, 36, 40, 41).

Meekers later took a working interest quitclaim assignment from Domestic Oil Corporation under the Am-

bassador lease, but reserved the right to contest the validity of this latter lease (Def. Ex. 5; R. 34, 45-46, 43).

If Meekers' claims under the first lease are valid, their present interests are a 1/16 overriding royalty and a 27/128 x 15/16 x 7/8 working interest. If the Ambassador lease were the valid lease, Meekers' interests would be a 27/128 x 29/32 x 7/8 working interest, with no overriding royalty, and subject to a $2,500.00 oil payment, Ambassador Oil Corporation having retained the oil payment and a 3/32 overriding royalty (R. 6, 11, 18, 56, 59).

The petitioners take issue with certain factual statements of the Court of Appeals.

The Court of Appeals stated in its opinion that Meeker did not repudiate the agreement between Ambassador Oil Corporation and Domestic Oil Corporation, and that he stood by until the well was completed as a producing well (R. 61, 66). The record shows that Mr. Meeker did not even take his assignment under the Ambassador lease until October 8, 1958 (Def. Ex. 5; R. 34, 45-46). Ambassador Oil Corporation and Domestic Oil Corporation resumed drilling operations under the purported settlement agreement, without Meeker's knowledge or agreement, approximately one month prior to this time, and completed the well as a producer on October 4, 1958 (R. 31, 32, 35-37, 40, 41, 60). Meeker at all times clearly stated his objections to the respondent's claims (R. 32, 35-37, 40, 41). He did accept the quitclaim conveyance from Domestic Oil Corporation for a part of his interest claimed, but expressly reserved in the instrument his right to contest the validity of the interest claimed by Ambassador Oil Corporation (Def. Ex. 5; R. 34, 45-46, 43).

The Court of Appeals stated that Meekers signed division orders and accepted benefits under the Ambassador

lease (R. 67). Meeker at all times made it clear that he had paramount title under his first lease, and therefore any benefits accepted were under it (R. 42-44).

The Court of Appeals stated that Hurst had not been given an extension of the 30-day lease by Mrs. Lowder (R. 58-59). Hurst testified that Mrs. Lowder had given him an oral extension (R. 26, 28, 30).

The trial court held that the 30-day lease had terminated for failure to continue the drilling operations with due diligence (R. 19). The Court of Appeals stated that under the facts and circumstances it could not say that the finding was erroneous, and accordingly affirmed it (R. 66). However, Hurst and Meeker both testified that drilling operations were terminated due to a spacing dispute with Sunray Oil Company, that drilling was resumed immediately upon the issuing of a spacing order by the Corporation Commission, and that it would not have been reasonable to continue operations in light of the dispute until the spacing order was obtained (R. 25-28, 41-42). This testimony was undisputed.

ARGUMENT

I. The Petitioners Were Entitled to a Trial by Jury.

A trial by jury was requested by the petitioners by endorsement on their complaint (R. 8). The trial court denied the request upon the grounds that the actions were equitable (R. 14), and also denied the motion made by the petitioners to reconsider its action and allow a trial by jury (R. 14-15).

Factual matters in dispute for consideration of a jury were whether drilling operations were continued with due diligence, and, if not, whether an oral extension was given

and a sufficient change of position made with reliance thereon to remove it from the prohibition of the Statute of Frauds; and the accounting prayed for in the complaint.

The petitioners were entitled to a jury trial on their first cause of action, first, because an accounting was prayed for in the complaint (R. 8), and, secondly, because this action was within the scope of the Declaratory Judgment Act.

In *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469 (1962), this Court stated:

> ". . . The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theatres, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them."

An accounting of sufficient complexity to prohibit a jury trial was not shown and does not exist in this case.

Under the older procedure, title to land could be determined in either a legal action by jury, if requested, or in an equitable action by the court, depending generally upon whether or not the plaintiff was in possession. *Whitehead* v. *Shattuck*, 138 U.S. 146 (1891); *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551 (1916).

In *Whitehead* v. *Shattuck, supra*, the Court stated:

> ". . . And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the

> plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp v. Babin, 19 How. 271, 278. It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an action is simply for the recovery and possession of specific, real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

In regard to determining title to land under the Declaratory Judgment Act, this Court has now stated in *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959):

> ". . . Since in the federal courts equity has always acted only when legal remedies are inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because a substantial legal remedy becomes available, must be re-evaluated in light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, Quia Timet and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules."

An action to quiet title to land by one in possession is a bill quia timet. *McConihay* v. *Wright,* 121 U.S. 201 (1887); *4 Pomeroy's Equity Jurisprudence (5th Ed.) 1021, 1027, Sections 1394 and 1398.*

No particular form of pleading is required under the Declaratory Judgment Act. *28 U.S.C. 2201; Rule 57, Rules of Civil Procedure for the United States District Courts* (Appendix).

As shown by the prayer of the petitioners' complaint (R. 7-8), no injunctive or other equitable relief was sought in this action. Under the Declaratory Judgment Act, the trial court should have allowed the jury to make a determination of legal title to the oil interests involved.

The technicality of whether or not the plaintiff is in possession should no longer be determinative of whether legal title to land may be decided by a jury in an ejectment action or must be determined by a court of equity in an action to quiet title.

The petitioners were entitled to a jury trial on their second cause of action, which involved all of the same basic facts as the first cause of action, for the reason that it was purely an action for money damages (R. 6-8). The Court of Appeals recognized this in its opinion, but stated (R. 66):

> "The Meekers would have been entitled to a jury trial upon proper and timely request therefor of any issues remaining for determination on their second claim. However, the trial court, in the exercise of its equity jurisdiction, had determined that the 30-day lease had terminated and that the Meekers had no title to any interest under such lease. Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' second claim."

This decision of the Court of Appeals for the Tenth Circuit was directly contrary to decisions of the Eighth and Ninth Circuits, and of this Honorable Court, which have all held that in actions where legal and equitable issues are joined, the right to a trial by jury is closely guarded, and the court may not try the equitable part of the action first, thereby causing the facts in the legal action to become res judicata, unless some special and impelling reasons for doing so exist in a particular case. *Leimer* v. *Woods*, 196 F.2d 828 (8th Cir. 1952); *Bruckman* v. *Hollzer*, 152 F.2d 730 (9th Cir. 1946); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). This would be true even though the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved, the jury rights it creates control. *Thermo-Stitch* v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961); *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469 (1962).

II. The Court Erred in Finding That the Petitioners in Any Manner Ratified the Interest Claimed by the Respondent or Were in Any Way Prohibited from Contesting That Interest.

In its opinion, the Court of Appeals stated that the petitioners accepted benefits under the lease interest claimed by the respondent and stood by and allowed certain work to be done under the latter claim, which amounted to a ratification of the claim, and that the petitioners were therefore prohibited or estopped from contesting it (R. 61, 66, 67). The Petitioners' disagreement with these factual statements were set forth above in the Statement of the Case. It is further pointed out that all of the factual conclusions set forth by the Court of Appeals and the trial court are matters which should have been determined by a jury and not the court.

We do not agree that there is any evidence in this case of facts, disputed or undisputed, which would have estopped or prohibited Meekers from contesting the respondent's claim. Mr. Meeker at no time acquiesced to Ambassador's claim, so there could be no reliance and change of position necessary for estoppel.

Oklahoma statutes that may be construed as involved on this point are *Okla. Stat., Tit. 15, Sec. 75 (1951)*, and *Okla. Stat., Tit. 16, Sec. 11 (1951)* (See Appendix). The court of appeals apparently relied on Section 75, Title 15 (R. 67).

There can be no ratification of any agreement between Meekers and Ambassador Oil Corporation, first, because Meeker has never had any agreement or transactions of any kind with that defendant and no one has ever purported to bind Meeker in any transactions with that company. There is nothing to ratify. Secondly, because in the only transaction Meekers have had with any privies of Ambassador, they not only did not ratify the Ambassador claim, but plainly stated that they did not recognize it and expressly reserved their right to contest it.

As to the conveyance from Domestic Oil Corporation to Meekers (Def. Ex. 5; R. 34, 45-46), the petitioners do not contest the validity of the "transaction," or any obligations under it. They expressly reserved the right to contest and deny the prior lease of Ambassador Oil Corporation, and such reservation was in and a part of the assignment. It is the respondent, not the petitioners, who is trying to deny its validity, and the respondent was not even a party to the transaction.

In construction of contracts, apparently conflicting provisions must be reconciled, rather than nullified, if reconciliation can be effected by any reasonable interpre-

tation. *17A C.J.S 163-164, Contracts, Sec. 309; 12 Am. Jur. 773, Contracts, Sec. 241; Frankfort Oil Co.* v. *Snakard,* 279 F.2d 436 (10th Cir. 1960).

Where two clauses are so repugnant that they cannot stand together, the first will be retained and the second rejected. *12 Am. Jur. 778, Contracts, Sec. 243; 17A C.J.S. 166, Contracts, Sec. 309; Fairbanks, Morse & Co.* v. *Miller,* 80 Okla. 265, 195 Pac. 1083 (1921).

General terms and provisions in a contract yield to specific ones. *12 Am. Jur. 779, Contracts, Sec. 244; 17A C.J.S. 173, Contracts, Sec. 313;* also see *Popplewell* v. *Jones,* 202 Okla. 185, 211 P.2d 283 (1949).

Mr. Meeker's obvious intention was to insure getting the working interest set forth in the latter conveyance, and at the same time reserve his right to have title to the 1/16 overriding royalty determined by litigation. A person may contract to do anything subject to restrictions of legality and public policy, and under no reasonable construction could the clause reserving the right to contest Ambassador's claim be determined invalid, even though a later general clause in the instrument states that the assignment is subject to the provisions of Ambassador's assignment to Domestic Oil Corporation. The proper interpretation of the instrument is that it was subject to the terms of the Ambassador assignment, if valid, but also subject to Meekers' right to contest the validity of the Ambassador lease.

Whether or not they received any benefits under the instrument is not material to this case, since they have always consented to all of the obligations involved. As a matter of fact, however, it is the position of the petitioners that they have never received any benefit under this instrument, since by the prior conveyance they al-

ready had paramount title to all of the property included in the latter, and more.

Regarding the statute noted above on estoppel by deed or conveyance (Sec. 11, Tit. 16), the Oklahoma cases on the subject show that it is no more than a restatement of the common law, as is the other statute referred to.

The very essence of an estoppel is that a person claiming its benefits must have been induced to do the things he did do, or to have altered his situation relying on the conduct of the party against whom the doctrine is invoked. *Tidal Oil Co.* v. *Flanagan*, 87 Okla. 231, 209 Pac. 729 (1922); *Coats* v. *Riley*, 154 Okla. 291, 7 P.2d 644 (1931).

A person already claiming title under a conveyance does not admit title in another by purchasing adverse claims, and is not estopped by the purchase from denying the validity of the claims purchased. *19 Am. Jur. 622, Estoppel, Sec. 23; 31 C.J.S. 199, Estoppel, Sec. 15; Newcomb* v. *Chapman*, 344 P.2d 1058 (Okla. 1959).

A deed having no validity cannot be the basis of an estoppel. *31 C.J.S. 223, Estoppel, Sec. 43; Coats* v. *Riley, supra.*

A quitclaim conveyance, such as is involved in this action may not be the basis of an estoppel. *31 C.J.S. 202, Estoppel, Sec. 18;* see *Weaver* v. *Drake*, 79 Okla. 277, 193 Pac. 45 (1920); *Newcomb* v. *Chapman, supra.*

All elements of estoppel are missing in this case. Meeker at all times claimed title paramount to that of the respondent and at no time agreed to any compromise. The well could not very well have been drilled relying on any act of Meeker when he did not even accept an assignment under the Ambassador lease until after the well was completed.

Even had the petitioners not reserved their right to contest the Ambassador claim, they would not have been estopped or prohibited from denying it. The case of *Newcomb* v. *Chapman, supra,* has completely disposed of all issues in this case as to ratification and estoppel. There the plaintiff brought an action to quiet title to mineral interests in Oklahoma. The question presented was whether the plaintiff, after purchasing a part of the mineral interest by a quitclaim deed from the grantee of a tax deed, was estopped from attacking the tax deed and claiming the entire interest in the property under a prior conveyance. The court stated, ". . . we are mindful of the fact that generally estoppel of the grantee of a deed is of the nature of equitable estoppel, and is predicated on the inability of a person in the eyes of the law to acquiesce in, and enjoy the benefits of a transaction, and at the same time reject the accompanying burdens," but held in favor of the plaintiff upon the reasoning and propositions of law set forth above.

CONCLUSION

For the reasons stated, the decisions of the courts below should be reversed upon the points of law set forth herein, and an order should be entered granting the petitioners a trial by jury in accordance therewith.

Respectfully submitted,

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APPENDIX

Constitution of the United States—Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. 1254 (1):

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

28 U.S.C. 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Rule 57, Rules of Civil Procedure for the United States District Courts:

The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., Section 2201, shall be in accordance with these rules, and the right to trial by jury

may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Oklahoma Statutes, Title 15, Section 75 (1951):

Acceptance of benefit includes obligations.—A voluntary acceptance of benefit of the transaction is equivalent to a consent to all of the obligations arising from it so far as the facts are known to the person accepting. R. L. 1910, Sec. 920.

Oklahoma Statutes, Title 16, Section 11 (1951):

Estoppel by receiving benefits.—Any person or corporation, having knowingly received and accepted the benefits or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves. R. L. 1910, Sec. 1150.

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962

No. [redacted] 46

CHARLES A. MEEKER, and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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In the
Supreme Court of the United States
OCTOBER TERM, 1962

No. 641

CHARLES A. MEEKER, and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Although the facts are stated in the opinion of the Court of Appeals (308 F.2d 875), we will briefly restate the facts.

Hettie E. Lowder owned the NW/4 and W/2 NE/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 240 acres.

On June 3, 1953, Hettie E. Lowder executed and delivered a five-year oil and gas lease to H. S. Smith, covering all the above described land except the W/2 NW/4

(R. 55). By mesne assignments, this lease was assigned to W. G. Haun. On December 30, 1957, Haun assigned the lease to Herman L. Hurst, reserving an overriding royalty of 1/16th of 7/8ths, which said overriding royalty was expressly made applicable to any extensions or renewals of this lease.

On April 30, 1958, Hurst procured from Hettie E. Lowder an oil and gas lease covering the same 160 acres as was covered by the lease assigned to him by Haun, said lease having a term of thirty (30) days from June 30, 1958. This lease was recorded in Book 385, page 694 (R. 47).

Prior to procuring the thirty (30) day oil and gas lease mentioned in the preceding paragraph, Hurst had entered into an agreement with Domestic Oil Corporation, American Drilling Company (an affiliate of Domestic Oil Corporation) and the Meekers, whereunder a test well was to be drilled on the Robinson farm which was situated near the Lowder farm (R. 26). The Robinson farm covers the SW/4 of Section 23-16N-4W (R. 38). The thirty (30) day Lowder lease had been procured by Hurst for the benefit of Domestic Oil Corporation, Hurst and the Meekers. Both the Meekers and Domestic had sold out small interests in the leasehold estate to various parties (R. 56). Domestic was the operator, *i.e.*, in charge of drilling and operating the leases (R. 17).

On July 1, 1958 (two days before the expiration of the primary term of the thirty (30) day lease), at the request of Hurst, a well location was staked on the Lowder farm, and some bulldozer work was done. Nothing was done thereafter at this particular location (R. 33).

On July 22, 1958, Hettie E. Lowder executed and delivered to Ambassador Oil Corporation, in consideration of a cash bonus, an oil and gas lease covering the entire Lowder farm, containing 240 acres. This lease was recorded August 14, 1958, in Book 388, page 639. Before buying the lease Ambassador had made a factual investigation and had consulted with counsel and had been informed by counsel that the thirty (30) day lease had terminated (R. 17).

In the latter part of August, 1958, Domestic Oil Corporation, apparently in ignorance of the Ambassador lease, and apparently believing that the thirty (30) day lease was still effective, caused a well location to be staked on the SW/4 NE/4 in Section 23-16N-4W, and on or about September 6, 1958, spudded a well exploratory for oil and gas at this location (R. 31). As noted hereinabove, this location was at a different location than the well staked by Hurst (R. 58).

Ambassador, upon learning that Domestic was drilling on the Lowder farm, notified Domestic on September 9, 1958, that Ambassador owned the oil and gas leasehold estate covering said land (R. 28). Upon receipt of this notice, Domestic stopped drilling. Domestic's attorney was consulted, and he advised that the thirty (30) day lease was probably dead (R. 37). Negotiations were commenced between Ambassador and Hurst, and as a result of these negotiations Ambassador assigned its oil and gas lease to Domestic insofar as said lease covered the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. The assignment from Ambassador to Domestic is dated September 15, 1958, and

was recorded September 30, 1958, in Book 390, page 592. The assignment contained this provision:

> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; . . . " (R. 59-60).

The assignment of the Ambassador lease was taken for the benefit of all the parties who owned an interest in the thirty (30) day lease (R. 36).

After receiving the assignment of the Ambassador lease, Domestic resumed drilling of the well on the Lowder farm, and, subsequently, the well was completed as a producing oil well on October 4, 1958 (R. 60).

On October 8, 1958, Domestic Oil Company assigned to Charles A. Meeker and Sybil Meeker, as joint tenants, an undivided one-half interest in the Ambassador lease insofar as the lease covers the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. The assignment contained this provision:

> "This assignment is made SUBJECT to the TERMS AND PROVISIONS of the agreement dated October 8, 1958, between Assignor and CHARLES A. MEEKER and is SUBJECT to its proportionate part of an outstanding 3/32 OVERRIDING ROYALTY INTEREST and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is SUBJECT to all of the provisions of the lease assignment from the AMBASSADOR OIL CORPORATION to DOMESTIC

OIL CORPORATION recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma" (R. 60).

Although the assignment to Meeker was not made until October 8, 1958, Meeker had been informed of the negotiations with Ambassador immediately after the Lowder well had been shut down because of the Ambassador claim (R. 40).

ARGUMENT

1. There was no right to a jury trial.

The Second Amended Complaint upon which this action was tried stated two causes of action: The first, to quiet title to a 1/16th of 7/8ths overriding royalty claimed under an oil and gas lease that had a primary term of thirty days; and, second, to quiet title and for money damages for an alleged slander of title to that overriding royalty interest.

Jury trial was demanded by endorsement on the Complaint, but was denied on the ground that the action was essentially an equitable action.

At the time the action was filed, and at the time the action was tried, the plaintiffs and their co-owners were in possession of the property producing oil and gas therefrom.

The instant action is not one for a declaratory judgment. It is a quiet title action joined with a claim for slander of title. The plaintiffs in their first cause of action

request that their title be established. In their second cause of action they adopt *all the allegations* of their first cause of action and plead slander of title. The first cause of action obviously states a case in equity. Just as obviously the second cause af action states a claim in equity joined by a claim for money damages.

The plaintiffs brought the action. They pleaded as they saw fit. Since the plaintiffs invoked the aid of equity, and since the very heart of the plaintiffs' claim depends on a determination of title by a court of equity, we submit that the court should be permitted to determine the question of title which the plaintiffs have asked it to determine. Surely the plaintiffs cannot frustrate the determination of any factual questions by the court by merely joining a claim for money damages with a claim for equitable relief.

The plaintiffs have not brought a suit at common law; they have brought an equitable action. And as pointed out in the many decisions of this Court and other courts, equity, having taken jurisdiction, ought to determine all the issues which are incidental to the basic equitable issue. This is not to say that there may not be actions in which the legal issues are so separate and independent from the equitable issues as to be triable separately to a jury; but here the legal claim is so inextricably bound with and dependent upon the equitable issue as to be inseparable therefrom; and the assertion of this legal claim should not convert the entire claim into one triable to a jury.

Professor Moore, in 5 Moore's Federal Practice, Section 38.16 at page 149, states:

"Where the court and jury issues are not factually related, then it is a matter of indifference so far as the mode of trial is concerned whether the court issues are tried first or vice versa. Where, however, the court and jury issues are factually related then it becomes important which type of trial shall be had first. This should be determined by the basic nature of the issue as formulated."

Citing *Camp* v. *Boyd*, 229 U.S. 530, 552 (1912), in Section 38.19(2) at page 169, Professor Moore states:

"If the claim is one properly equitable in character, there is no right to jury on an issue of damages that is incidental to the equitable relief which the claimant seeks. The general rule has often been stated, that equity 'having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.' In other words, there is no right to jury trial on an incidental issue of damages, even though a demand for jury is made, in an action: to set aside a fraudulent transfer; to reform a contract and, as reformed, to recover damages for its breach; for specific performance and damages for failure to perform at the time when performance under the contract was due; for damages in lieu of specific performance, where there was a basis for equity's jurisdiction but the chancellor in the exercise of a sound discretion declines to decree performance; for injunctive relief against wrongful conduct and to obtain monetary restitution or accrued damages."

In *Porter* v. *Warner Holding Company*, 328 U.S. 395, 399 (1946), this Court said:

"But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law. Alexander v. Hillman, 296 U. S. 222, 241, 242, 80 L.Ed. 192, 200, 201, 56 S.Ct. 204."

One may take the view as did the Court of Appeals, that the second cause of action states a claim at law triable to a jury. We believe this view ignores the fact that even in the second cause of action the plaintiffs assert that their title should be quieted thus invoking the aid of equity even in that cause of action.

The plaintiffs were not entitled to a jury trial in the quiet title action. Plaintiffs, together with their co-owners of the working interest, were in possession of the land covered by the oil and gas lease producing oil and gas therefrom. Consequently the plaintiffs did not have to sue for possession. In addition to this, in Oklahoma ejectment will not lie to enforce rights under an oil and gas lease when the lessee has not been in possession. *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551, 36 S.Ct. 711, 60 L.Ed. 1161 (1916); *Frey* v. *Glenn*, 206 Okl. 28, 240 P.2d 1061 (1952). Therefore, the plaintiffs neither could nor were required to bring an action in law in ejectment. They had to proceed in equity. A court of equity has jurisdiction between contesting oil and gas lessees claiming from the same lessor. *Gypsy Oil Company* v. *Marsh*, 121 Okl. 135, 248 Pac. 329, 331 (1926).

An action to quiet title is an equitable action. *Perego* v. *Dodge*, 163 U.S. 160, 165, 41 L.Ed. 113, 117 (1896); *Burk-*

hard v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Humble Oil & Refining Company* v. *Sun Oil Company*, 191 F.2d 705 (C.C.A. 5th, 1951); *Hester* v. *Watts*, 203 Okl. 97, 218 P.2d 641 (1950).

A jury trial is not a matter of right in an equitable action. *Parsons* v. *Bedford*, 28 U.S. (3 Peters) 433, 446, 7 L.Ed. 732, 737 (1830); *Barton* v. *Barbour*, 104 U.S. 672, 676, 26 L.Ed. 672, 676 (1881); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th 1948); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation*, 124 F.2d 563 (C.C.A.2d 1942); 31 Am. Jur., Jury, Sec. 24.

A court of equity having taken jurisdiction will retain jurisdiction in order to grant complete relief. *Camp* v. *Boyd*, 229 U.S. 530, 551, 552, 33 S.Ct. 785, 57 L.Ed. 1317, 1327 (1913); *Barton* v. *Barbour*, 104 U.S. 126, 26 L.Ed. 682 (1881); *Schaefer* v. *Gunzburg*, 246 F.2d 11, 15 (C.C.A. 9th, 1957) (*cert. denied* 355 U.S. 831, 2 L.Ed.2d 43); 5 Moore's Federal Practice, 2nd Ed., paragraph 38.19(2), page 169; 19 Am. Jur., Equity, Secs. 125, 127, pages 125 and 126.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 48, 57 S.Ct. 615, 81 L.Ed. 893, 918 (1936), this Court speaking through MR. CHIEF JUSTICE HUGHES, said:

> "The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . (citing cases). Thus it has no application to cases where recovery of money damages

is an incident to equitable relief even though damages might have been recovered in an action at law . . . (citing cases)."

The right to a jury trial in a diversity case is to be determined by federal law. *Simler* v. *Conner*, 372 U.S. 221 (1963). However, as that case points out, the fact that the action is one for declaratory judgment will not be determinative of the character of the action as being one at law or in equity.

In *Holland* v. *Challen*, 110 U.S. 52, 56, 28 L.Ed. 52, 56 (1884), it was said:

"It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

In *Camp* v. *Boyd*, 229 U.S. 530, 552, 57 L.Ed. 1317, 1327, a suit was brought in equity to enjoin the prosecution of an action of ejectment. A tract of land had been divided into three parcels. The plaintiff had equitable title only to two of the parcels, and legal title to the third parcel. At page 1327 the Court said:

"A court of equity ought to do justice completely, and not by halves. (citing authorities.)

"One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights

that otherwise would not be within the range of its authority. (citing authorities)."

Having evoked the aid of equity to establish the very right upon which their claim for damages depends, the plaintiffs should not be heard to urge that the court, without the intervention of a jury, had no right to consider the case. If the claim for damages can be decided only by a jury, and if the claim for damages must be heard either prior to a determination of the equity question, or simultaneously therewith, manifestly it would be impossible for the case to be tried except by a jury. In effect every equitable action, by the assertion of a claim for damages, would be transformed into a jury action. We submit that this result is not desirable, or workable.

We submit that the right to a jury trial should be governed by determining whether the basic character of the action is legal or equitable. This Court has recognized this principle as is shown by the cases cited. This is the rule in Oklahoma as is shown by *Russell* v. *Freeman*, 202 Okl. 421, 214 P.2d 443 (1950). It seems to be the test which is applied in most jurisdictions. 31 Am. Jur., Jury, Secs. 24 and 25.

The basic nature of the issue controls, even in a declaratory judgment action. 5 Moore's Federal Practice, 2nd Ed., Sec. 38.16, page 153.

This philosophy was expressed in *Institutional Drug Distributors* v. *Yankwich*, 249 F.2d 566, 569 (C.C.A. 9th, 1957), wherein the Court said:

> "It is not on every complaint now filed that a jury trial is accorded, even if there are issues normally triable at law and even if there is the requisite demand therefor. The Federal Rules of Civil Procedure did not change these princples, but affirmed them, since specific reference is made to the Seventh Amendment. A law action may be pleaded in the same complaint as a suit in equity. But, if the whole matter fall within the limits of equity jurisdiction, even separate statement and timely demand will not suffice. It is obvious also that although an independent counter-claim can be, and often must be pleaded under the Rules, it does not change the limits of equity jurisdiction."

Any other rule leads to procedural difficulties which are profound. If all questions of fact which relate to an incidental issue in an equitable action, which, if unrelated, would have been triable to a jury at common law, must be segregated and submitted to a jury, procedural chaos results. The end result of such a rule will be the impanelment of a jury in every case—in cases which are basically equitable, a needless imposition upon the time of citizens who are compelled to serve upon an unnecessary jury.

In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 3 L.Ed.2d 988 (1959), the plaintiffs sought relief by asking for a declaratory judgment and an injunction which would prevent the defendant from claiming treble damages under the anti-trust laws. This Court held that the plaintiff could not deprive the defendant of his right to a jury trial by striking a blow in equity to defeat a claim which was clearly at law.

In *Dairy Queen* v. *Wood*, 369 U.S. 469, 8 L.Ed.2d 44 (1962), the plaintiff asked for equitable relief in connection

with a legal claim, and this Court held that the plaintiff could not, by coupling with his claim at law, a request for equitable relief, deprive the defendant of his right to a jury trial on the legal claim.

Neither of these cases is conclusive in the instant case. Here the plaintiffs are making the claim; they claim in equity and ask damages as part of their remedy. Even if this Court decides that the claim for slander of title is not an incident to the quiet title suit, we submit that the plaintiffs, by making the claim, should not be permitted to tie the hands of the court of equity whose aid they had invoked. In other words, it should not be held that the entire matter must be submitted to a jury.

We believe that every case decided by this Court in which it has been held that a jury has been wrongfully denied, when closely analyzed, will reveal that the result has depended on the basic issue being one triable to a jury at law.

If the basic issue test provides no acceptable standard, and if the incidental rule has no particular relevancy, then we submit that this Court should not adopt a rule which would necessitate a jury trial in every case where the plaintiff joins with his claim for equitable relief a claim which would be triable to a jury. In such a situation, we submit, the trial court should be permitted to try the equity case without regard to the jury claim. If the disposition of the equity claim shows that there is no merit in the jury claim, this should end the matter. After all, in such a case the plaintiff invoked the aid of the court of equity.

2. If the plaintiffs were entitled to a jury trial, denial thereof was harmless error.

The trial court denied the plaintiffs' claim on two grounds: (1) On the ground that the thirty-day lease terminated when drilling operations were not pursued with due diligence; and (2) On the ground that the plaintiffs had ratified the settlement and compromise agreement between Ambassador and Domestic Drilling Company whereunder it was agreed that the thirty-day lease had terminated (R. 19). The trial court made a specific finding that no malice had been proven against Ambassador (R. 18). The opinion of the Court of Appeals fully concurred in the conclusion of the trial court respecting termination of the lease and the ratification of the compromise agreement (R. 65, 66, 67). The opinion of the Court of Appeals did not reach the question of malice, presumably because this issue was raised in connection with the alleged slander of title set forth in the second cause of action which the court found it unnecessary to consider (R. 66).

The plaintiffs admitted that no operations had been conducted between July 2 and the latter part of August. They sought to excuse this lack of diligence for a legal reason: namely, a possibility of well spacing by the Oklahoma Corporation Commission. Both the trial and the appellate court held that the mere possibility that the Corporation Commission might space the area for drilling for and the production of oil and gas did not constitute a valid reason for failure to pursue the drilling operations with due diligence (R. 19 and 65). That the mere possibility of the establishment of drilling and spacing units would not

prohibit drilling or constitute a legal excuse for not drilling, seems obvious. There was no application for spacing filed until July 16, 1958 (R. 58), and the operations on the Lowder land under the thirty-day lease had commenced July 2. The well could have been spudded and drilled to completion without being affected by the spacing application or the order creating forty-acre spacing which was entered in September. Title 52, O.S.A., Sec. 87.1 (see Appendix), provides that after the entry of a spacing order no well may be drilled at a location other than that fixed by the order. This statute also provides that no well covered by a pending spacing application may be drilled at a location other than that approved by an order of the Commission. Obviously, these provisions do not apply to the well which had been commenced prior to the filing of the application or the entry of the spacing order. The spacing orders themselves grant exceptions for wells theretofore drilled. The spacing order which was entered in September gave an exception for the Robinson well and would have provided for an exception for the Lowder No. 1 had the drilling of that well been continued (R. 65).

The plaintiffs sought to justify the delay in drilling by a legal impediment which in fact did not exist. Both the trial court (R. 19), and the Court of Appeals (R. 66) found that there was no legal impediment to the continuation of drilling operations. Both the trial court (R. 19) and the Court of Appeals (R. 66) held the thirty-day lease terminated for failure to pursue the drilling operations with due diligence. There was no contention by the plaintiffs that anything was done on the Lowder lease between July 2

and the latter part of August; there was no contention that there was any drilling prior to early September (R. 33).

The trial court correctly concluded, as a matter of law, that the thirty-day lease terminated for failure to pursue the operations with diligence. The determination was not one of fact; it was one of law. The facts were not in dispute.

In *Frank Oil Co.* v. *Belleview Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 265 (1911), the Court said:

> "In Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am.St.Rep. 942, it was held: 'A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor.'
>
> "This contract is an option to explore for gas and oil. The rule is settled by this court that, when contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound. Kolanchny v. Galbreath et al., 26 Okl. 772, 110 Pac. 902; Jones v. Moncrief-Cook Co., 25 Okl. 856, 108 Pac. 403."

In *Stephenson* v. *Calliham*, 289 S.W. 158, 159 (Civ. App., 1926), a well was commenced on an oil and gas lease four days before the end of the primary term. The hole was drilled to a depth of 153 feet and thereafter the lessee moved the rig from the premises. Six weeks later the lessor brought suit to quit title against the lease. The lessee contended

that notice of intention to forfeit must be given. The Court, in holding that the lease had terminated, said:

> "But that is not the case presented here. The 2-year period provided for in the lease expired on May 16, 1924. The lessee had commenced operations in accordance with the stipulations of the contract, which preserved the lease to the end of the stipulated period. From that day on the lease period could be projected only by continuous operations, so that the moment these operations ceased from any cause, other than the act of God, the public enemy, or the government, the lease ipso facto terminated, and could not be revived by any act of the lessee. It became absolutely inoperative. Under no provision of the contract could the lessee reenter and resume operations which he had previously discontinued."

In *Prowant* v. *Sealy*, 77 Okl. 244, 187 Pac. 235, 240 (1920), the Court said:

> ". . . if drilling operations were commenced on the premises within the three years for the purpose of discovering oil or gas and were still being prosecuted in good faith at the expiration of the three-year period, the term was thereby enlarged or extended during the continuance of such drilling operations . . ."

In the instant case the drilling operations ceased without legal cause, and the lease died.

Besides, any oral extension which Mrs. Lowder might have given would not bind Ambassador in the absence of knowledge. *Pierson* v. *McCrory*, 93 Okl. 117, 219 Pac. 641 (1923).

The plaintiffs attempted to extend the thirty-day lease by a token operation. Hurst attempted to get an extension of the lease from Mrs. Lowder, and testified he got an oral extension (R. 26); however, the trial court found no oral extension was given (R. 17). As a matter of law an oral extension would violate the Statute of Frauds. In Oklahoma an oil and gas lease conveys an interest in realty which is within the Statute of Frauds. *Gutowsky* v. *Jones*, 178 F.2d 60, 63 (C.C.A. 10th, 1949).

2 Summers Oil & Gas (Perm. Ed.), Sec. 302, page 276, states the rule regarding extensions of oil and gas leases as follows:

> "The primary term of an oil and gas lease may be changed or extended by a valid agreement between the parties, but such agreement is, in effect, a new lease or modification of an existing one and must satisfy the same requirements for validity and be executed with the same formalities as the original lease . . ."

See 37 C.J.S., Frauds, Statute of, Sec. 113, page 605.

In addition to the fact that the thirty-day lease terminated as a matter of law, the plaintiffs are estopped to deny that it did not. Not only did the plaintiffs accept an assignment of an interest in the Ambassador lease, but the plaintiffs also signed division orders and accepted payments under the Ambassador lease (R. 34, 42, 43).

On the question of estoppel there would be no question for a jury; the facts are admitted and we submit that the estoppel and ratification was established as a matter of law.

15 O.S.A., Sec. 75, is as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting."

One who purchases property under a deed which recites that the land is subject to another's lease cannot deny or dispute the lease. *Williamson* v. *Davis*, 74 Okl. 174, 177 Pac. 567 (1919).

In *Bush* v. *Person*, 18 Howard 82, 15 L.Ed. 273, 274 (1856), it was said:

> "It is familiar law, also, which was applied in Carver v. Jackson, 4 Pet. 86, 88, that a mere recital of fact in a deed is as effectual an estoppel as a covenant."

And on yet another ground there would have been no case for the jury. Under the Oklahoma law malice is a necessary element in a slander of title suit. *Keiser* v. *Kile*, 166 Okl. 41, 26 P.2d 194, 195 (1933), wherein the Court said:

> "The principal element in a suit for slander of title is malice. There must have been some malicious intent upon the part of the defendant at the time of doing the act complained of to constitute malice."

There is no dispute that Ambassador's representative consulted counsel and was advised that the thirty-day lease had terminated (R. 17). Domestic Oil Corporation was advised by its lawyer that the thirty-day lease had terminated

(R. 37). Mr. Meeker, one of the plaintiffs, knew that Domestic had been so advised (R. 42).

Advice of counsel is a complete defense in Oklahoma to a claim of slander of title. *Noble* v. *Johnson*, 180 Okl. 169, 68 P.2d 838 (1937). Not only did Ambassador's counsel advise Ambassador that the thirty-day lease had terminated, opposing counsel representing parties claiming adversely to the Ambassador lease so advised his clients. Under the circumstances, there would have been no question of malice to submit to the jury.

The court may direct a verdict where the plaintiff fails to prove a case. *Galloway* v. *U. S.*, 319 U.S. 372, 389, 87 L.Ed. 1458, 1470 (1942); *New York, New Haven & Hartford Ry. Co.* v. *Henagan*, 364 U.S. 441, 5 L.Ed.2d 183 (1960).

28 U.S.C. 2111 provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Denial of a jury trial is harmless error where there was no question to submit to the jury. *Forster* v. *Insurance Co. of N. Am.*, 139 F.2d 875 (C.C.A. 2d, 1944); *Freeman Contractors Inc.* v. *Central Surety Insurance Corp.*, 205 F.2d 607 (C.C.A. 8th, 1953); *Orenstein* v. *U. S.*, 191 F.2d 184 (C.A. 1st, 1951); *Tanimura* v. *U. S.*, 195 F.2d 329 (C.A. 9th, 1952).

CONCLUSION

It is submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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September, 1963.

APPENDIX

52 O.S.A., Section 87.1(d) in part provides:

> "The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited."

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 46

CHARLES A. MEEKER and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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Attorneys for Respondent.

December, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Respondent presents its petition for a rehearing in this Court and in support thereof shows:

GROUNDS FOR REHEARING

The reversal of the judgment of the Court of Appeals overlooks the fact that the *undisputed facts* show that petitioners accepted the benefits of a compromise and settlement which was made for their benefit.

There was a bona fide dispute as to whether the thirty-day lease or the Ambassador lease was the effective oil and gas lease. In settlement of this dispute, Domestic Oil Cor-

poration (the party in charge of the drilling operations for the group of owners to which petitioners belonged) acquired the Ambassador lease.

The Ambassador lease was acquired for the benefit of the drilling group. Mr. Edward E. Brook, who was president of Domestic Oil Corporation so testified (R. 36 and 37). Mr. Meeker was informed of this fact and so testified (R. 40-41). The opinion below so shows (R. 66).

Either the Ambassador lease was an effective lease, or the thirty-day lease was an effective lease. Both could not simultaneously exist. By taking an assignment of an interest in the Ambassador lease, petitioners acquired an interest in something in which they otherwise had no ownership or interest. In other words they accepted the fruits of a settlement. A productive oil well was completed *after* the settlement of the dispute had been agreed upon.

Insofar as petitioners are concerned this settlement was made by an agent without authority; but with full knowledge of all the facts, the petitioners took the benefits of the settlement. As a matter of law they could not both affirm and deny. They could not take the benefits and deny the burdens of the settlement.

That petitioners accepted the benefits is proven by an undisputed fact; the assignment to them (R. 60). That they had knowledge is proved by Meeker's testimony (R. 40-41).

Restatement, Second, Agency, Section 98 is as follows:

> "The receipt by a purported principal, with knowledge of the facts, of something to which he would not

be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election *of the other party* to the transaction." (Emphasis ours.)

Under Comment a. (p. 253) this statement is found:

"Even if he disclaims responsibility for the act of the purported agent, however, he becomes subject to liability to the person from whom the things were obtained to the same extent as if he had consented to become a party to the transaction, provided that he receives its proceeds with knowledge of the facts."

The rule in Oklahoma is in accord. A fairly recent expression by the Oklahoma Supreme Court appears in *Yellow Jacket Boat Company, Inc.* v. *Little Glasses Corporation,* 338 P.2d 1105, 1107 (1959), wherein the Court said:

"For said reason our opinion in No. 38,298 to the effect that where one voluntarily and with knowledge of the facts accepts the benefits of an act purporting to have been done on his account, by one claiming to act as his agent, though without authority, he thereby ratifies such act and makes it his own as fully as though he had authorized it in the beginning *and he may not ordinarily take the benefits and reject the burdens, but must either accept them or reject them as a whole, applies here.*" (Emphasis ours.)

In *D. W. L. Inc.* v. *Goodner-Van Engineering Company,* 373 P.2d 38, 42 (1962), the Oklahoma Court said:

"The ratification by acceptance of fruits flowing from a transaction made by a person whose authority is

denied constitutes a form of estoppel whose application is not dependent on reliance by one party upon the represention and conduct of another, *nor on the intent of the principal to ratify.* Where an alleged principal claims that a person who negotiated a business deal was not in fact his agent at all, but was merely a volunteer, a self-constituted agent, or an agent for another, he with nevertheless be held bound by whatever obligations or liabilities were assumed by his pretended agent in consummating the transaction, if such principal insists on retaining the fruits of the unauthorized transaction. 15 O.S. 1961, §§ 70 and 75 provide respectively:

> 'Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.'
>
> 'A voluntary acceptance of the ' enefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting.'

"See also, Okmulgee Coal Co. v. Hinton, et al., 95 Okl. 92, 218 P. 319, 322; Negim & Co. v. Harp et al., 98 Okl. 261, 225 P. 347; and First Nat. Bank of Muskogee v. Clark, 93 Okl. 23, 219 P. 370. In the last cited case it is held:

> 'Although a party may not have directly authorized an act which was performed, yet, where such party accepts the benefits of the act, it amounts to a ratification, and the party so ratifying the action taken accepts the burdens along with the benefits to be derived.'

"See also, 2 C.J.S. Agency §§ 49 and 66." (Emphasis ours.)

We believe it is quite clear that under the law generally, and under the Oklahoma law particularly, the act of the petitioners in accepting the assignment, ratified the compromise and settlement which Domestic had made with respondent.

The Oklahoma rule has been recognized by the Court of Appeals for the 10th Circuit in *Wolfe* v. *Shell Petroleum Corporation*, 83 F.2d 438, *cert. denied* 299 U.S. 553; *Wolfe* v. *Texas Co.*, 83 F.2d 425.

In *Crane Co.* v. *James McHugh Sons*, 108 F.2d 55 (C.C. 10th, 1939), at page 59 the Court said:

> "One who, with knowledge of the material facts concerning an act done by one assuming to act as his agent without authority, voluntarily accepts the benefits flowing therefrom, thereby ratifies the act and makes it his own as though he had authorized it from the beginning."

Again in *Knight* v. *Yoakam*, 338 P.2d 1075 (Okla. 1959), the Court reiterates the rule that by accepting the benefits of an unauthorized act of an agent, the principal ratifies the agent's act.

During the oral argument of this case, Mr. Justice Black inquired of counsel what the grounds were for the alleged estoppel. The cases cited hereinabove belatedly answer that inquiry, and show that the Oklahoma Supreme Court has given vigorous and complete recognition to Title 15, O.S.A., Sec. 75, cited at page 19 of respondent's brief. Furthermore, the cases show that the ratification does not rest in true estoppel. In *D. W. L. Inc.* v. *Goodner*,

supra, the Court says: "The ratification by acceptance of the fruits * * * constitutes a form of estoppel whose application is not dependent on reliance by the party upon the representation and conduct of another, nor on the intent of the principal to ratify."

On the undisputed facts we submit that the trial court would never have submitted this case to the jury, and that the denial of a jury trial did not constitute a denial of a *real right* under the circumstances of this case. We submit that the disposal of this case in this Court should be determined in accordance with the philosophy of 28 U.S.C. 2111.

We submit that the denial of a jury trial, has not accomplished an injustice in this case; we submit that the case is ripe for summary judgment, and that this Court should not protract the litigation by refusing to pronounce judgment. We submit that this Court can say that upon the facts as pleaded by petitioners, petitioners would have been entitled to a jury trial; but that on the *admitted facts proven*, there was no case to submit to a jury.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration, the judgment below should either be

affirmed, or remanded with instructions to determine whether there was in fact, any question to submit to a jury.

Respectfully submitted,

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December, 1963.

CERTIFICATE OF COUNSEL

I, C. Harold Thweatt, hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

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